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BEFORE THE ARIZONA CORPORATION COMMISSION

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IN THE MATTER OF THE
APPLICATION OF QWEST
COMMUNICATIONS CORPORATION
D/B/A QWEST LONG DISTANCE FOR
EXTENSION OF ITS EXISTING
CERTIFICATE OF CONVENIENCE
AND NECESSITY TO INCLUDE
AUTHORITY TO PROVIDE RESOLD
AND FACILITIES-BASED LOCAL
EXCHANGE AND RESOLD LONG
DISTANCE SERVICES IN ADDITION
TO ITS CURRENT AUTHORITY TO
PROVIDE FACILITIES-BASED LONG
DISTANCE SERVICES, AND
PETITION FOR COMPETITIVE
CLASSIFICATION OF PROPOSED
SERVICES WITHIN THE STATE OF
ARIZONA

DOCKET NO. T-02811B-04-0313

**QWEST COMMUNICATIONS
CORPORATION'S POST-HEARING
BRIEF**

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Qwest Communications Corporation ("QCC" or "Applicant") hereby files its Post-Hearing Brief. QCC requests that the Arizona Corporation Commission ("Commission") issue its order approving QCC's Application and Petition for Certificate of Convenience and Necessity.

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I. INTRODUCTION

The Enterprise Market¹ for telecommunications services is competitive.² Enterprise Market customers commonly consider the availability of “one-stop shopping” (where they can secure all of their telecommunications services, including local and long distance, from a single vendor) as an important factor in making buying decisions. A number of competitors, large and small, have entered the Enterprise Market, and every one of the new competitors provides both local and long distance services to customers in that Market. However, unless the Commission approves this Application, under the structure created by the Telecommunications Act of 1996 (the “Act”),³ which opened telecommunications to competition, no single company from the Qwest family of companies may provide both local exchange services and interLATA telecommunications services to Enterprise customers in Arizona. This proceeding arises because QCC, a Qwest entity that is authorized to provide interexchange services, applied for operating authority to provide local exchange services to Enterprise customers in the parts of Arizona where Qwest Corporation (“QC”) is the incumbent local exchange carrier (“ILEC”), and for authority to serve all kinds of customers in the rest of the state. Without the requested Certificate of Convenience and Necessity (“CC&N”), QCC will not be able to provide the “one-stop shopping” capability its Enterprise customers demand and that existing competitors currently offer. This Commission’s grant of the authority requested will position QCC to bring further competition to the Enterprise Market.

QCC meets all the criteria established by statute and rules governing grants of CC&N. The Arizona Corporation Commission Staff (“Staff”), the only party in this

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¹ The parties are in agreement that the Enterprise Market is defined as large business and government customers subscribing to 4 or more lines. *See* Second Staff Report, Hearing Exhibit S-2 at 2; Supplemental Rebuttal Testimony of M. LaFave on behalf of Qwest Communications Corporation, Hearing Exhibit A-10 at 3 n. 1.

² *See infra* at 15-16, 43-44.

³ Pub. L. No. 104-104, 110 Stat. 56 (“Act”). *See* 47 U.S.C. §§ 15 *et seq.*

1 proceeding besides the Applicant, acknowledges that QCC is a fit and proper applicant,
2 and that its Application is complete. Notwithstanding that acknowledgement, Staff urges
3 the Commission to deny entirely the right to serve within the ILEC territory, or
4 alternatively, to grant QCC's requested authorization, but with serious restrictions and
5 conditions. Staff proposes to deprive QCC of its right to file in the future for more
6 extensive authorization than it has requested here, and to saddle QCC and its affiliated
7 ILEC with burdensome and costly record generation, recordkeeping and reporting
8 obligations placed uniquely on QCC and its affiliated ILEC.

9 The primary issues presented are whether an applicant meeting all of the
10 qualification criteria and other requirements provided by the Commission's rules may (1)
11 lawfully be denied the CC&N it has requested, or (2) have its CC&N laden with
12 burdensome and costly obligations that do not appear in any rule or Commission order, or
13 in any other CC&Ns issued by the Commission, and be enjoined from filing future
14 petitions to expand its authority. QCC believes that where an applicant that meets all the
15 written qualifications rules, and is not disqualified by reason of any established
16 disqualification criteria, the Commission must issue its order granting the CC&N.

17 Staff's proposed restrictions and conditions should be denied. The application of
18 unwritten rules and criteria that are conceived and applied solely to this Applicant would
19 be arbitrary and capricious, discriminatory, not competitively neutral, and violate
20 principles of equal protection. Such action would be unlawful under the United States and
21 Arizona Constitutions, as well as Arizona statutes, and the Act.

22 A denial of the CC&N requested by the Applicant, and an order enjoining
23 Applicant from filing future petitions for greater authority than it has presently requested,
24 each constitutes a prohibition of QCC's ability to provide intrastate telecommunications
25 service. Such prohibition is unlawful under Section 253(a) of the Act, and is not saved by
26 the state regulatory authority savings clause in Section 253(b) of the Act, because the

1 restrictions demanded by Staff are not imposed on CLECs on a competitively neutral and
2 nondiscriminatory basis.

3 In all events, the restrictions and conditions recommended by Staff lack rational
4 relationship to the concerns Staff describes in its filings and testimony, are unreasonable
5 or unduly burdensome, or are matters properly addressed in other dockets or generic
6 proceedings. QCC points out that the Iowa Commission adopted alternative reporting
7 mechanisms that would serve the Staff's stated purposes, and do so more economically.

8 The Administrative Law Judge ("ALJ") hearing this matter requested that the
9 parties address certain questions concerning the effect on the affiliate ILEC that may
10 follow from QCC's market entrance. The record in this proceeding shows that these
11 concerns are not reasons to deny or condition QCC's certificate, given the
12 competitiveness of the Enterprise Market. Regardless, when the ILEC loses retail
13 customers but retains a wholesale relationship to the new provider for the lost retail
14 customer, under the Commission's previous holdings and analysis, the ILEC is kept whole
15 financially.

16 Another matter the ALJ raised concerns the limited waiver of the Commission's
17 Affiliated Interest Rule 803, regarding organization and reorganizations of public utility
18 holding companies, previously granted to the Qwest family of companies. The question
19 posed by the ALJ is whether the limited waiver should be changed in light of this
20 Application. Since this Application does not involve any such reorganization, the waiver
21 is not implicated either, and should be left intact. Staff agrees no change in the waiver is
22 necessary, but seeks to couple the waiver to new reporting obligations it would have the
23 Commission impose.

24 Staff attempts to use the ALJ's questions as a reason to support the unlawful
25 restrictions and conditions it seeks to place on QCC. Staff's attempt to justify its
26 restrictions and conditions are unreasonable for these purposes as well.

1 Last, and importantly, the Commission should grant QCC's Application because
2 the important goals of the Act relating to the promotion of competition, the reduction of
3 regulation, the securing of lower prices and higher quality services for American
4 telecommunications consumers, and the encouragement of the deployment of new
5 telecommunications technologies and innovation, are advanced by QCC's entrance into
6 the markets it has requested. Customers in the Enterprise Market make buying decisions
7 based on the providers' ability to solve all of the customer's telecommunications needs.
8 Currently, no entity within the Qwest family of companies can provide the true "one-stop
9 shopping" those customers desire, and Enterprise customers are moving to Qwest's
10 competitors in increasing numbers. The public interest will be served by the grant of this
11 Application because of the addition of QCC as a competitor and as an available choice for
12 Enterprise Market customers.

13 II. BACKGROUND AND HISTORY OF THIS PROCEEDING

14 A. The Telecommunications Act of 1996

15 The Telecommunications Act of 1996 amended the Communications Act of 1934.
16 The legislation was enacted in an effort "to promote competition and reduce regulation in
17 order to secure lower prices and higher quality services for American telecommunication
18 consumers and encourage the rapid deployment of new telecommunications
19 technologies."⁴ With the passing of the Act, Congress "ended the longstanding regime of
20 state-sanctioned monopolies [of local telephone service]" by "fundamentally
21 restructur[ing] local telephone markets."⁵

22 The Act requires providers of telecommunications services to interconnect directly
23

24
25 ⁴ *Id.*

26 ⁵ *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999). *See also, Verizon Md. Inc. v. Pub. Serv. Comm'n.*, 535 U.S. 635, 638 (2002) (Act created new telecommunications regime designed to foster competition in local telephone markets).

1 or indirectly with the facilities and equipment of other providers.⁶ Under the Act, ILECs
2 have additional obligations to provide to requesting carriers (i) interconnection to its local
3 exchange network that is equal in quality to that provided by the local exchange carrier to
4 itself or any affiliate, on nondiscriminatory rates, terms and conditions, (ii)
5 nondiscriminatory access to network elements on an unbundled basis, (iii)
6 telecommunications service for resale at wholesale rates without unreasonable or
7 discriminatory conditions or limitations upon the resale of such service, and (iv) physical
8 collocation of equipment necessary for interconnection or access to unbundled network
9 elements on rates, terms and conditions that are just, reasonable, and nondiscriminatory.⁷

10 Other provisions of the Act apply only to Bell Operating Companies ("BOC[s]"),⁸
11 one of which is QC, formerly known as U S WEST Communications Corporation, Inc.
12 Among those provisions are 47 U.S.C. § 271 and § 272, which read together provide that
13 originating interLATA services may only be provided by an affiliate separate from the
14 BOC ILEC.⁹ The separate affiliate must operate independently from the BOC.¹⁰
15 Sweeping nondiscrimination safeguards apply to the dealings between a Section 272
16 affiliate and the BOC, to assure that the BOC does not discriminate between that affiliate
17 and any other entity in the provision or procurement of goods, services, facilities, and
18 information, or in the establishment of standards.¹¹

19 As part of the Act's scheme to end the regime of state-sanctioned monopolies in
20 local telephone service, the Act provides that "No State or local statute or regulation, or
21 other State or local legal requirement, may prohibit or have the effect of prohibiting the
22

23
24 ⁶ 47 U.S.C. §§ 153(44), 251(a).

⁷ 47 U.S.C. § 251 (c).

⁸ See 47 U.S.C. § 153(4).

⁹ See 47 U.S.C. § 272 (a).

¹⁰ See 47 U.S.C. § 272(b).

¹¹ See 47 U.S.C. § 272(c) & (e).

1 ability of *any entity* to provide any interstate or *intrastate* telecommunications service.”¹²

2 **B. The Applicant QCC**

3 1. QCC Is an Entity Separate and Distinct From the ILEC QC.

4 The Applicant in this proceeding is Qwest Communications Corporation, which
5 throughout has been referred to as “QCC.” The ultimate parent corporation of QCC is
6 Qwest Communications International Inc., which owns Qwest Services Corporation.
7 Qwest Services Corporation, in turn, owns QCC and QC.¹³ QC is the ILEC and BOC that
8 provides local exchange services in defined areas in Arizona. QC is prohibited by Section
9 271 of the Act from providing originating interLATA telecommunications services; in
10 contrast, QCC may provide interLATA and intraLATA long distance and private line
11 services, and if properly certificated, may also provide local exchange services.¹⁴

12 2. QCC is a Business Corporation Organized Independently From QC, and
13 Operates as a Section 272 Separate Affiliate.

14 QCC is a for-profit business corporation formed under the laws of the State of
15 Delaware.¹⁵ QCC currently holds a CC&N from the Commission to provide facilities-
16 based interexchange services.¹⁶ QCC operates in accordance with the Section 272
17 separation requirements: It has separate operations, separate books and accounts, separate
18 officers, directors and employees, and operates on an arm’s length basis from QC. QCC
19 is unable to financially obligate QC or encumber QC’s assets.¹⁷ Transactions between

20
21 ¹² 47 U.S.C. § 253(a) (emphasis added).

22 ¹³ See *Supplemental Rebuttal Testimony of Mary Ferguson LaFave*, Hearing Exhibit
23 A-10 at 1-2.

24 ¹⁴ See *Id.*. See also, discussion *infra* at Section III.e.1.

25 ¹⁵ See Hearing Exhibit A-10 at 2. QC, on the other hand, is a Colorado corporation.

26 ¹⁶ On December 4, 2003, the Commission approved QCC's request for a CC&N to
provide competitive Facilities-Based Long Distance Telephone Services in Decision No.
66612. With the current Application, QCC is requesting to have its CC&N modified to
include Resold Long Distance Service, Resold Local Exchange Service and
Facilities-Based Local Exchange Service, in addition to the competitive Facilities-Based
Long Distance authority previously granted.

¹⁷ See Hearing Exhibit A-10 at 2 (lines 12-22). See also, 47 U.S.C. § 272 (b).

1 QCC and QC are posted for public inspection¹⁸ so other carriers know about the
2 transactions, and may avail themselves of the same services from QC on
3 nondiscriminatory rates, terms, and conditions.

4 **C. The Business Purpose of QCC's Application**

5 A substantial part of the Enterprise Market wants to deal with a single entity rather
6 than multiple entities for their telecommunications needs, whether those are local
7 exchange service, Asynchronous Transfer Mode and frame data products, long distance or
8 dedicated Internet access. They seek service from a single entity, with a single contact, a
9 single bill, and one place to go to for accountability for service. This is commonly
10 referred to as "one-stop shopping."¹⁹ No single Qwest entity can provide "one-stop
11 shopping" currently. The business purpose behind the Application is to enable the 272
12 affiliate - the only Qwest company that may legally be so enabled - to provide both local
13 exchange services and interLATA services, and to offer Enterprise Market customers one
14 stop shopping.²⁰

15 **D. The Application**

16 Nearly one and one half years ago, on April 23, 2004, QCC filed an Application
17 and Petition²¹ with the Commission requesting that its existing CC&N be extended to
18 include the authority to provide competitive resold long distance service, competitive
19 resold local exchange service and competitive facilities-based local exchange service in
20 addition to the competitive facilities-based long distance authority previously granted. In
21 the initial filing, the local exchange services for which the CC&N was requested were not
22 limited in scope geographically or by type or category of customer.

23
24 ¹⁸

Id.

¹⁹

See Id. at 3-4.

²⁰

Id.

²¹

Qwest Communications Corporation Application and Petition, Hearing Exhibit

26 A-1.

1 On December 17, 2004, QCC filed a Supplement to Application and Petition.²²
2 That filing supplemented Section A-9 of the Application and Petition by adding a new
3 proposed Local Exchange Services QCC Arizona Tariff No. 3, which included certain
4 business services.²³

5 On February 23, 2005, Staff filed its First Staff Report on the revised application.²⁴
6 Staff recommended approval of the CC&N with the restriction that the approval should
7 initially be limited to areas outside of the QC ILEC service area.

8 On May 13, 2005, Staff filed its Second Staff Report.²⁵ In the Second Staff Report,
9 Staff presented an alternative recommendation:

10 Staff is filing this supplement to its February 23, 2005, Staff Report in order
11 to present an alternative recommendation which would allow QCC to
12 provide resold and facilities-based local service to Large Business
13 customers within QC's service territory. Staff believes that this approach
14 would respond to the Company's concern about the ability to market
15 services to Large Business customers through one entity yet would also
16 address Staff's primary concerns which relate to the small business and
17 residential markets.²⁶

15 On May 16, 2005, QCC filed its Second Supplement to its Application and
16 Petition²⁷ to narrow the scope of the requested certificate for resold and facilities-based
17 local exchange services. The Second Supplement Application contains certain
18 *self-imposed* geographic and customer category restrictions. Inside the QC local

19
20 ²² *Qwest Communications Corporation Supplement to Application and Petition*,
Hearing Exhibit A-2.

21 ²³ The services listed were: Basic Local Voice Service; Direct-Inward Dialing
22 Services; Custom Calling Services, Hunting Services; Directory Listing Services, Local
23 Operator Services; Local Directory Assistance Service; Screening and Restriction
24 Services; Caller Identification Blocking Options; IntraLATA, Intraexchange Private Line
25 Services; Customer Premises Wire and Maintenance Plans; and ISDN PRI services. The
26 tariff pages relating to the aforesaid services were also filed, as amended by an errata
filing made on January 12, 2005. See *Notice of Errata*, Hearing Exhibit A-3.

24 ²⁴ First Staff Report, Hearing Exhibit S-1.

25 ²⁵ Second Staff Report, Hearing Exhibit S-2.

26 ²⁶ Hearing Exhibit S-1 at 1.

26 ²⁷ *Qwest Communications Corporation Second Supplement to Application and
Petition*, Hearing Exhibit A-4.

1 exchange service area, QCC seeks the right to provide competitive resold and
2 facilities-based local exchange services only to business and government customers²⁸ with
3 4 or more switched access lines or their equivalent.²⁹ The other portions of its
4 Application, as related to the scope and type of authority, were not changed.

5 Thus, the QCC Application and Petition currently before the Commission *does not*
6 *seek the authority to provide local exchange services to residential and small business*
7 *customers inside the QC service area. The QCC Application currently before the*
8 *Commission limits QCC's authority to provide local exchange services inside the QC*
9 *service area to Enterprise customers, a market which Staff calls "highly competitive" in*
10 *Arizona.*

11 **E. Staff's Proposed Restrictions and Conditions**

12 In the First Staff Report, Staff raised 5 "concerns"³⁰ related to the Application as it

13
14 ²⁸ As clarified by the testimony, "enterprise customer segment" includes governments
15 and government agencies. See Hearing Exhibit A-10 at 4 (II. 7-10).

16 ²⁹ Second Supplement to Application and Petition, Exhibit 1, Section A-10. The
17 complete statement of the markets QCC requests authority to serve is stated as follows:

18 QCC requests that its existing CC&N for competitive Facilities Bases Long
19 Distance Service be modified to include the following additional services for the
20 geographic areas indicated:

1. Competitive Resold Long Distance Service on a statewide basis.
2. Competitive Resold and Facilities-Based Local Exchange Service on a
21 statewide basis for large business customers and/or accounts with 4 or more
22 switched access lines or their equivalent. For purposes of determining an
23 eligible large business account, all individual locations of a multi-location
24 customer shall be added together to determine whether the 4 switched
25 access lines or their equivalent threshold has been met for a given
26 customer/account.
3. Competitive Resold and Facilities-Based Local Exchange Service for
residence customers and small business customers and/or accounts with
three or less switched access lines or their equivalent who are located
outside QC's service territory.

30 Hearing Exhibit S-1 at 8:

These unresolved concerns encompass, inter alia,

1. The ability of QCC to leverage QC's ILEC position and engage in anti-
competitive conduct including but not limited to cross-subsidization and,
price-squeezing;
2. The potential for significant confusion on the part of customers given the
similarity in names;

1 then stood to provide competitive local exchange services within the QC service area,
2 including residential, small business and Enterprise customers. Staff proposed to resolve
3 its concerns by recommending that QCC's Application should be approved only with
4 respect to areas outside of QC's service territory.³¹ QCC responded to the First Staff
5 Report by filing its Response to Staff Report, on March 16, 2005.³² A copy of QCC's
6 Response to Staff Report is attached hereto as Exhibit A.

7 However, upon further reflection, as noted above, Staff reconsidered the matter and
8 issued its Second Staff Report, "in order to present an *alternative recommendation* which
9 would allow QCC to provide resold and facilities-based local service to Large Business
10 customers within QC's service territory." Staff concluded that "this approach would
11 respond to the Company's concern about the ability to market services to Large Business
12 customers through one entity yet would also address Staff's primary concerns which relate
13 to the small business and residential markets."³³

14 Having resolved its old concerns in the Second Staff Report, Staff created some
15 new ones. The QCC Application currently before the Commission voluntarily limits
16 QCC's authority to provide local exchange services inside the QC service area to
17 Enterprise customers. *Staff acknowledges in the Second Staff Report that the Enterprise*
18 *Market is highly competitive, and that competition would be served by granting QCC's*
19

-
- 20 3. Use of QCC (the CLEC) to evade QC's (the ILEC) obligations within QC's
21 service territory.
22 4. The potential for discrimination by QC.
23 5. Whether it is in the public interest for an RBOC to have an affiliated CLEC
operating within its territory, when the local market is not sufficiently
competitive.

24 ³¹ *Id.* at 8, 21. Staff recommendation number 19 states: "That QCC should initially
be approved to provide service only in areas outside of QC service territory."

25 ³² While Staff states that the restrictions and conditions it proposes in its Second Staff
Report alleviate the concerns Staff surfaced regarding potential for anti-competitive
conduct and discrimination by Qwest (*see* Hearing Exhibit S-2 at 1-2), QCC reaffirms the
26 arguments made in its Reply with respect to those issues.

³³ *See* Hearing Exhibit S-2 at 1 (emphasis added).

1 *Application.*³⁴ Yet Staff illogically continues to state that its First Staff Report, which
2 *would completely prohibit QCC from providing local exchange services inside the QC*
3 *service area, is an alternative proposal to the Second Staff Report.*³⁵

4 Further, the QCC Application and Petition currently before the Commission *does*
5 *not seek authority to provide local exchange services to residential and small business*
6 *customers inside the QC service area. Yet, Staff stands by its request that the Commission*
7 *enjoin QCC from filing for authority to provide such service for 24 months.*³⁶ There is no
8 basis in law for that proposition, or for the Commission to close its doors to any entity that
9 seeks to provide intrastate telecommunications services.

10 Notwithstanding Staff's conclusion that the Enterprise Market is competitive³⁷ and
11 QC has a "diminished presence" in that Market,³⁸ and regardless that the Staff's
12 previously stated concerns are alleviated by limiting QCC to serving Enterprise customers
13 only for local exchange services within the QC serving area, Staff devised
14 recommendations for a number of new record generation and reporting requirements³⁹ to
15 be performed and made by QCC and QC. QCC objects to these requirements on the basis
16 that they are unreasonable for the reasons discussed at length below.

17 Through the First Staff Report and the "alternative" Second Staff Report, Staff
18 made a number of recommendations regarding restrictions and conditions Staff believes
19 should be adopted by the Commission. QCC does not object to those conditions that are
20 commonly placed on any carrier seeking competitive services certification. To be clear on
21 the matters QCC contests, Qwest lists below each restriction and condition to which it
22

23 ³⁴ See Hearing Exhibit S-2 at 2.

24 ³⁵ *Id.* at 1, 6; Reporter's Transcript of Proceedings ("TR"), Vol. I. at 153 (lines 6-12).
³⁶ Exhibit S-2 at 7; TR, Vol. I at 203 (lines 23-25), 204 (lines 1-25), & 205 (lines 1-
25 20).

³⁷ *Id.* at 2.

³⁸ *Id.* at 3.

26 ³⁹ See Exhibit S-2 at 8.

1 objects:

2 First Staff Report (Hearing Exhibit S-1)

- 3 • Staff's recommendation that QCC should initially be approved to provide
4 [facilities-based or resale local exchange] service in exchanges where ILECs
5 other than QC are providing telephone services. Section 3.1 at 11; Section
6 6.1 at 21, ¶ 19.

7 Second Staff Report (Hearing Exhibit S-2) (Where scope of QCC's Authority to
8 provide local exchange services in QC's service area is limited to Enterprise
9 customers)

- 10 • Section III.3.at 7: In its entirety, Staff's recommendation that QCC should
11 not file an application to amend its certification to provide local exchange
12 services to residence an/or small business customers in the QC service area
13 in Arizona for a period of 24 months from the date of the Commission's
14 Order approving its request for an expanded CC&N.
- 15 • Section III.4. at 7: Only to the extent Staff's recommendation stated therein
16 adopts or refers to the "24 month period" discussed in Section III.3.
- 17 • Section III.8.b.1-5 at 8 in its entirety.⁴⁰

18
19 ⁴⁰ The full text of the conditions stated in Section III.8.b.1-5, to which QCC objects,
are as follows:

- 20 1. The total number of business accounts that have moved from QC to QCC by
QC wire center are to be provided in excel file format using electronic media.
21 2. The total number of business lines that have moved from QC to QCC by QC
wire center are to be provided in excel file format using electronic media.
22 3. The total annualized revenues associated with total business accounts provided
in excel file format using electronic media.
23 4. State-wide summarized Listings Data should be provided. The information
should contain all main listings and additional line listings by QC, QCC, CLECs,
24 ILECs, Wireless Providers or Other for each NPA-NXX. This information should
be separated by residence and business and include a count of all listings in QC's
25 comprehensive databases(s), not just those published in the white pages directories
or available via directory assistance. All information should be rolled up to the
26 NPA-NXX level; no end-user specific information should be provided. The
information shall be provided in excel file format using electronic media.

1 The Commission's rules regarding CC&Ns for competitive telecommunications services
2 also require that there be a finding that services also are competitive⁴¹ and that the
3 proposed tariff rates for services are just and reasonable.⁴² QCC passes all of these
4 requirements.

5 1. The Application is Administratively Complete and Notice Was Published
6 Properly.

7 On February 2, the Staff issued "Staff's Letter of Administrative Completeness,"⁴³
8 certifying that QCC's application was administratively complete as an application for a
9 CC&N request filed under A.A.C. 14-2-1103 *et seq.* QCC properly published its Notice
10 of Application and Hearing in this matter, pursuant to the Procedural Order issued
11 February 1, 2005, as evidenced by the affidavit of publication filed in this Docket on
12 February 24, 2005.⁴⁴

13 2. Staff Found That the Services QCC Proposes to Offer Are Competitive.

14 In the First Staff Report, Staff states its findings regarding the Applicant's request
15 that its services be classified as competitive using the criteria established in
16 A.A.C. R14-2-1108.⁴⁵ With respect to interexchange services, Staff concludes that the
17 market is fully competitive.⁴⁶ With respect to local service, outside the QC local exchange
18 areas, where QCC proposes to offer competitive local exchange services, QCC will be
19 contending against the established ILECs as well as CLECs holding statewide
20 certifications. With respect to local exchange services within the QC service area, where
21 QCC proposes to offer local exchange services only to Enterprise customers, in the
22 Second Staff Report, Staff concluded that "the Enterprise Market is highly competitive."⁴⁷

23 ⁴¹ A.A.C. R14-2-1105(B) and R14-2-1108.

24 ⁴² A.A.C. R14-2-1105(C) and R14-2-1104(D).

25 ⁴³ Hearing Exhibit A-5.

26 ⁴⁴ *Notice of Filing Certification of Publication*, Hearing Exhibit A-6.

⁴⁵ *See* Hearing Exhibit S-1 at 16-20.

⁴⁶ *Id.*

⁴⁷ *See*, Hearing Exhibit S-2, p. 2.

1 Also, Staff Witness E. Abinah testified that the services QCC proposes to offer are
2 competitive.⁴⁸

3 3. QCC Possesses Adequate Financial, Technical, and Managerial Resources
4 to Provide the Proposed Services.

5 In the First Staff Report, Staff examines QCC's financial resources from the
6 variety of perspectives that the Commission considers for all CC&N applications, and
7 found no objections whatsoever. Staff notes that QCC will rely on the financial resources
8 of its parent company. Audited financial statements, with notes, were provided for the
9 year ended December 31, 2003, for the parent corporation, Qwest Communications
10 International, Inc., reflecting assets in excess of \$26.2 billion.⁴⁹

11 Staff acknowledges that QCC has the necessary authority and provides local
12 exchange services in many states and interexchange services in virtually the entire nation.
13 Staff found that QCC possesses the technical capabilities to provide the services it is
14 requesting the authority to provide.⁵⁰

15 Staff found QCC to be financially and technically qualified without any
16 reservations:

17 Q. [Ms. Scott] Could you please summarize your findings and
18 recommendations with respect to the Applicant's technical and financial
19 capability to provide service in the state.

20 A. [Mr. Bostwick] As far as the technical and financial
21 capabilities, I found QCC and its parent suitable for granting them a license
22 to provide the services that they requested, basically resold local exchange,
23 facilities-based local exchange, and resold long distance.⁵¹

24 ⁴⁸ TR, Vol. II at 245.

25 ⁴⁹ See, Hearing Exhibit S-1, p. 3-4.

26 ⁵⁰ See, Hearing Exhibit S-1, p. 3. See also, testimony of Staff witness E. Abinah, TR,
Vol. II at 244-245.

⁵¹ TR, Vol. I at 111 (lines 13-25). See also Tr. Vol. II at 244-245.

1 4. Posting of Performance Bond is Required After the Grant of the Requested
2 CC&N.

3 The obligation to post a performance bond arises subsequent to the grant of the
4 CC&N. Staff has recommended that QCC post a \$135,000 performance bond, only a
5 slight increase from the current \$100,000 performance bond QCC has posted.⁵² QCC has
6 not refused to post the recommended bond.

7 5. QCC's Proposed Rates Are Just and Reasonable.

8 Staff examined QCC's tariff and proposed price list rates, and concluded that
9 QCC's rates are reasonable and should be approved.⁵³

10 6. QCC's Application Passes Muster with Regard to All Other Matters
11 Typically Examined by the Commission.

12 QCC has met all of the requirements of the Commission's rules regarding CC&Ns
13 for competitive services. Additionally, in the First Staff Report, Staff examined the
14 Application in the context of the other issues the Commission typically considers,
15 including directory listings and directory assistance, number portability, universal service,
16 quality of service, access to alternative local exchange service providers, 911 service,
17 custom local area signaling services, and equal access for interexchange carriers.
18 Additionally, Staff examined QCC regarding complaints and lawsuits. Staff made no
19 findings or recommendations that would support disqualification of QCC.

20 7. QCC Is in Compliance with Commission Decision 66612, and Section 272
21 of the Act.

22 In addition to the Commission's rules, and the matters described above which are
23 typically examined by the Commission in a CC&N proceeding, the Hearing Division
24 asked Staff to report on several other matters, specifically relating to QCC.⁵⁴ Staff was

25 ⁵² See Hearing Exhibit S-1 at 4.
26 ⁵³ See Hearing Exhibit S-1 at 12.
 ⁵⁴ Procedural Order (Feb. 1, 2005).

1 instructed to address QCC's compliance with the requirements of Decision No. 66612, the
2 scope and status of the joint federal / state independent audit required of QCC's affiliate
3 QC regarding its separate competitive affiliates under Section 272 of the Act, and whether
4 the reaffirmation of the limited waiver of the Commission's Affiliate Interest Rules
5 (granted in Decision No. 64654) should be revised in light of this Application. The matter
6 of the waiver is discussed in Section III.D, *infra*.

7 In regard to QCC's compliance with the requirements of Decision No. 66612, the
8 First Staff Report finds no substantive non-compliance, and states that Staff is not aware
9 of any complaint filed by another carrier against QCC and/or QC alleging anticompetitive
10 conduct.⁵⁵ Regarding the joint Section 272 audit, Staff has docketed the Ernst & Young
11 Report on the first biennial audit with the Commission. Staff stated no irregularities from
12 that Section 272 audit report, and reports that no one has filed comments on that audit
13 report.⁵⁶

14 **B. Restrictions and Conditions Proposed by Staff in Excess of Those Provided by**
15 **Rule or Imposed on Other Carriers Should be Denied Because They Are Not**
16 **Authorized By Law and Violate Principles of Equal Protection.**

17 The Commission's powers and duties are limited to those declared in the Arizona
18

19 ⁵⁵ See Hearing Exhibit S-1, Section 2.6 at 5. See also, TR, Vol. I at 121-122. In
20 Decision No. 66612, the Commission ordered Staff to monitor QCC's filings of copies of
21 any and all contracts and/or agreements, written or verbal, between QCC and its affiliates
22 to ensure that QCC and its affiliates are not engaging in anticompetitive behavior (see
23 Finding of Facts, No. 59). Also, QCC is required to submit copies to Staff of its contracts
24 and agreements with its affiliates within thirty days of execution. Staff states:

25 Staff has reviewed QC's website and determined that contract and/or
26 agreements with its affiliate, QCC, are listed on QC's website. In addition,
Staff has reviewed the execution date and the date submitted of a sample of
the contracts and/or agreements to ensure QCC's filings are submitted
within thirty days. Staff has informed QCC, in writing, that four of the
sample contracts and/or agreements were filed late. At this time, Staff is
not aware of any complaint filed by another carrier against QCC and/or AC
alleging anticompetitive conduct.

⁵⁶ See Hearing Exhibit S-1, Section 2.7 at 6. See also, TR, Vol. I at 6.

1 Constitution and implementing statutes.⁵⁷ In this regard, Arizona courts have long held
2 that it is the Legislature, and not the Commission, that has the “paramount power” to
3 regulate in areas other than ratemaking:

4 [T]he paramount power to make all rules and regulations governing public
5 service corporations not specifically and expressly given to the commission
by some provision of the Constitution rests in the legislature[.]⁵⁸

6 Equally well established is the fact that the Legislature retains the “paramount power” to
7 regulate the granting and withdrawal of the right to operate a utility in Arizona--that is,
8 certificates of convenience and necessity--because such regulation has nothing to do with
9 the Commission’s ratemaking authority.⁵⁹

10 Accordingly, The Commission’s power to grant a CC&N is therefore limited.
11 *Trico*, 92 Ariz. at 381, 377 P.2d at 315. The Legislature has enacted statutes that
12 authorize the Commission to investigate all applicants for a certificate of convenience and
13 necessity for a given area (*see* A.R.S. §§ 40-281 to 285), and to issue a certificate upon a
14 showing that the issuance to a particular applicant would serve the public interest.⁶⁰

15 The Commission has, in turn, established rules to provide notice of the criteria that
16 will be applied in determining whether or not the issuance of a CC&N to an applicant will
17 serve the public interest. Specifically, through the promulgation of A.A.C. R14-2-1106,
18 the Commission has established the standards for reviewing an application for a CC&N.⁶¹
19 Under the rule, the Commission must approve the request for a CC&N unless one of five

20
21 ⁵⁷ *See U S WEST Communications, Inc. v. Arizona Corp. Com'n*, 197 Ariz. 16, 23 28,
3 P.3d 936, 943 (App. 1999); *Application of Trico Elec. Co-op, Inc.*, 92 Ariz. 373, 381,
377 P.2d 309, 315 (1962).

22 ⁵⁸ *Corporation Comm'n v. Pacific Greyhound Lines*, 54 Ariz. 159, 176, 94 P.2d 443,
450 (1939).

23 ⁵⁹ *See Tonto Creek Estates Homeowners Ass'n v. Arizona Corp. Comm'n*, 177 Ariz.
49, 56, 864 P.2d 1081, 1088 (App. 1993).

24 ⁶⁰ *James P. Paul Water Co. V. Arizona Corporation Commission*, 137 Ariz. 426, 429,
671 P.2d 404, 407 (1983). *See also, Pacific Greyhound Lines v. Sun Valley Bus Lines*, 70
25 Ariz. 65, 216 P.2d 404 (1950).

26 ⁶¹ *See U S WEST*, 197 Ariz. at 23 32, 3 P.3d at 944 (“Rule R14-2-1106 sets forth the
grounds for denying CC&Ns and sets conditions to the CC&Ns that are issued.”).

1 express conditions is shown through evidence presented at a hearing. *See, supra* at 14-18.
2 A review of these criteria demonstrates that the standard for approval, as established by
3 the Commission, is a “no harm” standard (i.e., there will be “no harm” or a “lack of
4 detriment” to the public).⁶²

5 Thus, unless the Commission determines that one or more of the five criteria set
6 forth in the rule exists, the application must be approved as it is in the public interest. For
7 example, if the applicant possesses adequate financial resources and technical competency
8 to provide the proposed services, has provided all information requested, and can provide
9 a performance bond, the Commission cannot reject the application or use its authority to
10 impose conditions on the applicant or the affiliate in exchange for granting approval.

11 In this case, Staff conceded that QCC had met all of the requirements under the
12 rule. As demonstrated above, Staff admitted that QCC had the technical and financial
13 capabilities required to provide service to the area at issue. Moreover, QCC provided a
14 complete application and all information required, as evidenced by the letter of
15 sufficiency issued by Staff. QCC has not refused to post a performance bond. Finally, the
16 services to be offered by QCC under the proposed CC&N are “competitive,” as discussed
17 in Section III. A. 2 *supra*.

18 Despite this uncontroverted evidence, Staff has recommended that separate
19 conditions be imposed on QCC and its affiliate QC. In making such a recommendation,
20 Staff wholly abandoned the standards established in the statutes governing CC&Ns and
21 A.A.C. R14-2-1106. Instead of addressing whether the five-part test in the rule had been
22 satisfied, Staff determined that approval of QCC’s application would serve the public
23 interest only if the conditions were imposed. When examined, Staff acknowledged that it
24

25 ⁶² *See Pueblo del Sol Water co. v. Arizona Corp. Comm'n*, 160 Ariz. 285, 286, 772
26 P.2d 1138, 1140 (App. 1980); *Arizona Public Service Co. v. Mountain States Tel. & Tel.*
Co., 149 Ariz. 239, 242, 717 P.2d 918, 921 (App. 1985).

1 had recommended the imposition of many of these conditions to analyze the state of
2 competition for purposes of hypothetical future QC AFOR proceedings; among other
3 reasons discussed *infra* at Section III.C.5 at 30. Nowhere do these matters appear in the
4 rule or otherwise. Instead, Staff relies upon overly broad and general policy statements
5 and hypothetical scenarios without making any connection to the application before it.⁶³

6 Staff's recommendations also violate QCC's equal protection rights because they
7 treat QCC differently than other CLECs without any rational justification. The Arizona
8 Constitution, Art. II, § 13, and the Fourteenth Amendment to the United States
9 Constitution both guarantee citizens, including QCC, equal protection under the law.
10 These equal protection clauses guarantee citizens like treatment to all other similarly
11 situated unless there is a sufficient justification for disparate treatment.⁶⁴

12 QCC and the other CLECs that are already authorized and providing the service for
13 which QCC seeks authorization, are similarly situated. They are all telecommunications
14 services providers qualified under the Commission's statutes and rules to provide service
15 to Arizona customers. They are all public service corporations that provide the same type
16 of telecommunications service. They all seek to sell these services and make a profit.
17 The only difference between QCC and these CLECs is that QCC is an affiliate of QC.
18 Staff's recommendations fail even the most lenient equal protection test.⁶⁵

19 In short, it is apparent that Staff simply ignored the criteria stated in the rule, and is
20 using this proceeding as an attempt to arbitrarily impose additional regulatory
21 requirements on QCC and QC.

22
23
24 ⁶³ TR, Vol. I at 179 (lines 15-25); *id.* at 180 (lines 1-25); *id.* at 181 (lines 1-5); *id.* at
185 (lines 9-25); *id.* at 186 (lines 1-25).

25 ⁶⁴ See *Plyer v. Doe*, 457 U.S. 202, 216 (1982); *State v. Beckerman*, 168 Ariz. 451,
453 (App. 1991).

26 ⁶⁵ See *Kenyon v. Hammer*, 142 Ariz. 69, 78, 688 P.2d 961, 970 (1984). See also, *City
of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985).

1 **C. Alternatively, Each of Staff's Proposed Recommended Restrictions Are**
2 **Unreasonable and Should be Denied.**

3 In the alternative to denial of Staff's recommended restrictions and conditions
4 based on the reasons stated in Section III. B *supra*, and without waiver of those claims,
5 QCC states that each of Staff's proposals should be denied because they are unnecessary
6 or unreasonable.

7 1. Staff's Recommended Restriction in the First Staff Report—To Totally Bar
8 QCC from Providing Local Exchange Services Inside QC Service Area—Is
9 Illogical and Unreasonable in Light of Staff's Conclusion That the Public
10 Interest is Served by Permitting QCC to Provide Services to Enterprise
11 Customers in Those Areas.

12 In the First Staff Report, Staff recommended a complete restriction against QCC
13 providing local exchange service inside the ILEC service area. Apparently, Staff has
14 abandoned that restriction, which was embodied in condition 19, in favor of the
15 recommendations contained in the Second Staff Report.⁶⁶ That is not entirely clear,
16 however, because Staff continues to describe the Second Staff Report as an "alternative"
17 recommendation to the Commission. Regardless, Staff's original restriction against QCC
18 providing local service inside the ILEC's service area cannot be logically reconciled with
19 the Second Staff Report. As noted above, in the First Staff Report, Staff recommends that
20 QCC should not be certificated to provide local exchange inside the ILEC's local service
21 area. That cannot be a viable "alternative recommendation" when Staff has subsequently
22 found that the interests of competition and the public interests⁶⁷ would be served by QCC
23 providing service to Enterprise customers in those same areas. It would be illogical for
24 the Commission to totally bar QCC from serving inside QC service area when the
25 evidence shows that the public interest is served by permitting QCC to serve Enterprise
customers in that same area. For the foregoing reasons, and for the reasons QCC stated in

66 See TR, Vol. I at 166 (lines 11-20).

67 See Hearing Exhibit S-2 at 2-3.

1 its Response to Staff Report (*see* Exhibit A attached hereto), Staff's recommendation in
2 the First Staff Report (that QCC should initially be approved to provide [facilities-based
3 or resale local exchange] service in exchanges where ILECs other than QC are providing
4 telephone services, (*see* Section 3.1 at 11 and Section 6.1 at 23 ¶ 19), should be rejected.

5 2. Staff's Recommendation That QCC Should Not Be Permitted to File an
6 Application to Amend Its Certification For 24 Months Should be Denied
7 Because It Is Unreasonable and Would Deny QCC's Rights to Due Process
8 of Law.

9 Despite the fact that the Application now before the Commission does not ask for
10 the right to provide local exchange services to residential and small business customers in
11 the ILEC's service area, Staff refuses to withdraw its recommendation that QCC should
12 be barred, by Commission order, from applying for an amendment to its certification for
13 two years.⁶⁸ Staff does not cite any statute or rule supporting such heavy-handed
14 treatment, which amounts to nothing more than an injunction against QCC's exercise of
15 its rights.

16 It is hard to imagine a justification for such a draconian measure, and Staff's
17 attempts to do so fall far short. It is clear that Staff opposes granting QCC the right to
18 service residential and small business customers in the ILEC service area, and wants to be
19 sure that QCC does not seek such authority in the near or intermediate term future.⁶⁹ The
20 question at this point is entirely hypothetical—QCC is not requesting such authority.
21 However, should it ever arise in the next two years, Staff wants to cut-off the legal
22 processes that are available to any other entity desiring such authority. Not only does

23 ⁶⁸ *Id.*, Section III.3 at 7.

24 ⁶⁹ Cross-examination of Staff Witness E. Abinah:

25 Q. You don't know of your own knowledge whether or not QCC will ever file an
26 application to expand its Certificate of Convenience and necessity, do you?

A. You know, no, I don't. But in order to make sure that QCC does not turn
around and file an application to provide service to residential customers in QC's
territory, we believe this provision is appropriate.
TR, Vol. I at 206 (lines 15-23).

1 Staff want to cut-off QCC's right to file for such authority, Staff wants the Commission to
2 dictate now, in this proceeding, in which the matter was not at issue, what new, non-rule-
3 based criteria QCC would have to meet in order to gain such authority, when, and if, QCC
4 ever does file such a petition.

5 If that breathtaking attempt to deny QCC its rights were not problem enough,
6 certain of the 18 month's worth of record-keeping and reporting that Staff would require
7 before it would consider an amendment to QCC's certificate to add residential and small
8 business⁷⁰, *have nothing whatsoever to do with residential and small business service,*
9 *customers, or markets.* Since throughout those 18 months QCC will only be serving
10 Enterprise customers, the data Staff would have QCC compile and report pursuant to its
11 conditions in paragraphs 8.a. and 8.b.1-3, will only reflect Enterprise customer lines,
12 accounts and revenues.

13 A.R.S. § 40-282(C) provides that the Commission may only attach conditions to a
14 request for a CC&N extension that public convenience and necessity require. *See also,*
15 *Trico Elec. Co-op., Inc. v. Corporation Commission*, 86 Ariz. 27, 339 P.2d 1046 (1959)
16 (noting that any such conditions may not be unreasonable or unlawful, and the public
17 interest is the controlling factor). The CC&N sought by QCC is not exclusive. Any
18 future extension sought by QCC similarly would not be exclusive. Staff's proposed
19 moratorium serves no purpose since it simply bans one competitor from entering the
20 market.

21 Moreover, Staff's proposed condition to place a two-year moratorium on QCC for
22 any CC&N expansion is against public policy. Arizona's public policy is to encourage
23 competition in telecommunication services. A.R.S. § 40-281. Placing a two-year
24

25 ⁷⁰ See Hearing Exhibit S-2 at 7 ("Any application by QCC shall be accompanied by at
26 least 18 months of the data identified in paras. 8 and 9 below which period shall commence
from the date the Commission issues its order in this case.").

1 moratorium on QCC's ability to expand service to what is already a competitive arena is
2 anti-competitive, and discriminatory. Staff's recommendation again violates principles of
3 equal protection in that it would have QCC treated differently from similarly situated
4 competitors for no legitimate state interest. *See* discussion *supra* at 18-21. It further
5 violates QCC's right to due process because even though the Company may have a
6 legitimate basis for requesting a CC&N extension as provided by statute and rule, it would
7 be barred from having its request heard and decided on the merits. *See* A.R.S. § 40-282.

8 For the foregoing reasons, Staff's recommended conditions stated in the Second
9 Staff Report, Section III.3., must be denied.

10 3. Section 253 of the Act Prohibits Staff's Proposed Restrictions Against QCC
11 Providing Local Exchange Services.

12 As part of the Act's scheme to end the regime of state-sanctioned monopolies in
13 local telephone service, the Act provides that "No State or local statute or regulation, or
14 other State or local legal requirement, may prohibit or have the effect of prohibiting the
15 ability of *any entity* to provide any interstate or *intrastate* telecommunications service."⁷¹
16 Each of the two Staff-recommended restrictions discussed immediately above (the
17 complete bar against residential and small business service from the First Staff Report, or
18 the 24-month injunction against filing from the Second Staff Report) are proscribed by
19 Section 253.

20 Staff may claim that because QCC is affiliated with local exchange service
21 provider QC by common ownership, Qwest as a whole is not prohibited from providing
22 intrastate services under the Staff's proposed restrictions. However, that argument must
23 fail because of the broad sweep of the words "*any entity*" in Section 253. As discussed
24 *supra* at 7, QCC is a business, for-profit corporation incorporated *separately* from QC.
25 QCC operates *independently* from the BOC QC, has *separate officers and directors*, and

26 ⁷¹ 47 U.S.C. § 253(a) (emphasis added).

1 *separate books of account. QCC may not obligate QC for QCC's indebtedness, and may*
2 *not encumber QC's assets. Indeed, the existence and separateness of QCC is required by*
3 *Section 272, which was enacted together with Section 253. It would be surpassingly*
4 *strange that an entity that must be established according to one part of the Act (Section*
5 *272) is not among those contemplated by the phrase "any entity" under another part of the*
6 *Act (Section 253).*

7 Staff states that it is "mindful" of the provisions of Section 253(a). Staff goes on to
8 state that it believes the recommendations it makes come within the savings clause of
9 Section 253(b).⁷² "Staff believes that its recommendations in this case are necessary to
10 protect the development of competition in QC's service territory and ensure that all
11 providers are treated on a competitively neutral basis".⁷³ In the Second Staff Report, Staff
12 expands on its view of Section 253(b):

13 In Staff's opinion, the Commission has the discretion to determine the
14 nature and timing of the local exchange entry by a CLEC affiliate within the
15 ILEC's service territory so this can be accomplished in a competitively
neutral manner and without having competition harmed within the local
market in QC's service area.⁷⁴

16 There are obvious problems with Staff's position. First, Staff's concern regarding
17 development of competition in QC's service territory, and the timing of market entry by
18 any entity, are not among the public policy concerns enumerated in Section 253(b).
19 Second, in the context of the Application now before the Commission, and the Second
20 Staff Report, the Staff is on the record⁷⁵ that QCC's entry into the Enterprise Market will

21
22 ⁷² 47 U.S.C. § 253(b) states:

23 STATE REGULATORY AUTHORITY.--Nothing in this section
24 shall affect the ability of a State to impose, on a competitively neutral basis
and consistent with section 254, requirements necessary to preserve and
advance universal service, protect the public safety and welfare, ensure the
continued quality of telecommunications services, and safeguard the rights
of consumers.

25 ⁷³ Hearing Exhibit S-1 at 11.

26 ⁷⁴ Hearing Exhibit S-2 at 1.

⁷⁵ See *supra* at Section III.A.2.

1 be good for competition in that market and not harmful.

2 Assuming *arguendo* Staff's proposed restrictions are consistent with the public
3 policy concerns that form the basis of the savings clause in Section 253(b), the restrictions
4 are not competitively neutral, and therefore may not be applied. Under either of the
5 Staff's proposed restrictions, QCC will be barred from providing local exchange service
6 to all or to large segments of customers in the QC service area. The Commission has not
7 similarly denied any other carrier permission to provide local exchange service in those
8 same areas, and it would be patently offensive to the competitive neutrality provisions of
9 Section 253 for it to deny QCC's application. "Competitively neutral" as it appears in 47
10 U.S.C. § 253(b) has been interpreted to mean that any regulation that "creat[es]
11 unnecessary competitive inequities among telecommunications providers" is unlawful.
12 *RT Commc'ns, Inc. v. FCC*, 201 F. 3d 1264, 1269 (10th Cir. 2000) (citation omitted);
13 *Cablevision of Boston, Inc. v. Pub. Improvement Comm'n.*, 184 F.3d 88, 105 (1st Cir.
14 1999). Assuming that the commission has granted CC&Ns to similarly situated CLECs,
15 or even to CLECs that have less technical and/or financial capabilities than QCC, its
16 denial of Qwest's CC&N request undermines the competitive-neutrality requirement of
17 Section 253(b). The Commission cannot deny some carriers CC&Ns and thereby place
18 those carriers at a competitive disadvantage in relation to other carriers. *RT Commc'ns*,
19 201 F.3d at 1268-69 (unlawful to grant incumbent local exchange carriers market access
20 while saddling new entrants with different rules for market entry); *U S WEST Commc'ns*
21 *v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1120 (9th Cir. 1999) (not competitively neutral to
22 require new entrants alone to bear costs from which other carriers are exempt).

23 Staff attempts to divert the Commission's attention from the non-neutrality of its
24 recommendations by pointing to CC&N applications involving rural ILECs that have
25 sought to have their CLEC affiliates certificated. Staff states that the Commission has
26 previously denied the application of the affiliates of such other LECS to provide local

1 exchange service inside the service area of the affiliated LEC.⁷⁶ However, besides
2 ignoring whether the Commission's actions in those matters pass muster under Section
3 253, Staff's comparison of QCC's Application to the Commission's orders in those other
4 circumstances fails to consider the relative competitive impacts. The point is best made
5 by reference to the Qwest testimony on the point:

6 Q. The Staff has stated in this proceeding that the Commission
7 has previously denied the application of the affiliates of other LECs to
8 provide local exchange service inside the service area of the affiliated LEC.
Please state your view of the public policy considerations of those other
proceedings as contrasted to the QCC application.

9 A. We believe that the state's denial of a CC&N to the affiliate of
10 the non-BOC LECs to provide local exchange service inside the ILECs
11 service area is contrary to the goals of the Telecommunications Act of 1996
12 and specifically contrary to Section 253 of the Act. Beyond that, however,
the situations are strikingly different from this case, and for that additional
reason should not be held up as the public policy standard in Arizona.

13 First, it is important to take into account the demography of Arizona
14 and compare the population centers to the service areas of the different
15 ILECs. It is apparent that the largest market opportunity is inside the QC
16 service area. When Valley Telecom's CLEC affiliate is precluded from
17 providing service to Willcox, it is still able to compete for the opportunity to
18 provide service to 99% of the population of Arizona. Compare that to QCC:
19 If QCC is precluded from serving inside QC's area, QCC is precluded from
20 serving probably 90% of the Arizona population. The degree of preclusion
21 that is worked on the applicant is slight to the affiliate of the independent
22 telco, but is virtually total to the affiliate of the BOC.

23 Second, the independent telephone companies whose affiliates have
24 sought local exchange CC&Ns from this Commission enjoy an exemption
25 from the provisions of Section 251(c). Under the rural exemption, those
26 LECs do not have to open their networks to competitors by providing
unbundled network elements, collocation, or resale at wholesale rates.
Thus, those independent telephone companies are not facing the same
degree or type of competition that QC faces in its service areas. To the
extent that the Commission might have looked for a healthy level of
competition as a reason to grant a CC&N to an affiliate of an ILEC, there
was not likely any significant competition present in those cases. As
discussed above, in the case of QC in the enterprise market, there is healthy
competition. Therefore, there is a factual difference, in that there is high
competition in the case of QC, where there was none in the case of the other
ILECs.⁷⁷

⁷⁶ Hearing Exhibits S-1 at 11. *See also*, TR, Vol I. at 182-183.
⁷⁷ Hearing Exhibit A-10 at 8-9.

1 Thus, it is clear that QCC, *like no other CLEC, will be foreclosed from large*
2 *market segments* under the recommendation contained in either Staff Report, a result that
3 would be decidedly disparate from the standpoint of competition.

4 4. The Conditions that Staff Recommends Be Placed On QC Are Inappropriate
5 For a QCC CC&N.

6 In their conditions listed under Section 8.b. of the Second Staff Report, to which
7 QCC objects substantively, as well as the conditions 2, 5, 6 and 7, to which QCC objects
8 because QC is not a party to this proceeding, Staff seeks to impose obligations on QC.
9 While QCC and QC are indeed affiliated by common ownership, as established above
10 they are separate and distinct entities operationally and legally. The Commission may not
11 burden QCC's CC&N with conditions on QC.

12 QC did not intervene in this case. QC was not joined in this case. QC did not
13 appear by counsel in this case. Staff did not request that QC be ordered to appear in this
14 case, and no order was issued causing QC to appear. Staff testimony indicates that Staff
15 believes that QC and QCC are the "same company," but offers as the only proof of that
16 assertion that certain individuals represent each company at the Commission.⁷⁸

17 It is elementary that an entity that is not a party to a case cannot be bound by an
18 order arising out of the case. If Staff wished to litigate matters involving QC, it should
19 have properly brought QC before the Commission. Staff did not do so. Accordingly,
20 because QC was not a party to this case, it is unlawful to burden QCC's CC&N with the
21 conditions on QC that Staff recommends.

22 ///

23 ///

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26

⁷⁸ Direct Testimony of Staff Witness E. Abinah, TR, Vol. I at 177.

1 5. Conditions 8.b.1-5 that Staff Recommends Placed On QC Are Unreasonable
2 and Should be Denied.

3 a. Staff's Primary Purpose for the Data—Future Use in a QC AFOR
4 Proceeding—Is an Improper Purpose in this Proceeding.

5 Staff seeks to impose on QC certain record-generation and reporting requirements
6 relating to the number of business accounts, business lines, and annualized revenues that
7 move from QC to QCC.⁷⁹ Staff acknowledges that the information it seeks will not be
8 used to determine whether QCC is a fit and proper applicant for the CC&N, or to
9 determine whether QCC is providing adequate service.⁸⁰ Rather, Staff sees the
10 information “as being important to the future [QC] AFOR price cap proceeding.”⁸¹
11 However, as Staff acknowledges, the AFOR proceeding would be a QC case, not a QCC
12 case, and in that context Staff would look at the revenue for potential imputation to QC.⁸²
13 Again, Staff inappropriately ties together different entities and different cases. In making
14 this request, Staff mixes a party and a non-party, an error that is compounded in this
15 instance by the fact that the proceeding here proceeds from a fundamentally different
16 matter (a competitive CC&N) from the distant future AFOR matter (a rate case).

17 b. Staff's Conditions in 8.b.1-3 Are Unreasonably Vague and
18 Burdensome, and Ineffective for the Intended Purpose; Less
19 Burdensome Alternatives Have Been Ordered by the Iowa Board of
20 Utilities Pursuant to a General Rulemaking When It Considered this
21 Same Issue.

22 1) Discussion of Staff's Proposed Record-Keeping and Reports

23 Staff wants QC to provide reports, every six months for 3 years, concerning the
24 business accounts, lines, and revenues it loses to QCC. However, Staff does not know
25 whether QC tracks the data Staff seeks, and has not undertaken any analysis of how
26

79 *See supra* at n. 40.

80 *See Cross-examination of Staff Witness A. Fimbres, TR, Vol. I at 131.*

81 *See id.* at 132.

82 *See id.* at 135.

1 difficult it would be for either QC or QCC to begin tracking the data.⁸³ In fact, the
2 evidence is that those reporting requirements will require a new record-keeping effort;
3 current systems used by QC do not have the capability to track in that manner, and “it
4 would take an extraordinary amount of time and money through IT changes to even
5 implement the tracking of the information.”⁸⁴

6 Beyond the expense QC would incur to track the data, there is a risk of intangible
7 costs to competition as well. QCC raised the issue that in order for QC to create the data
8 in 8.b.1-3, it will have to ask a disconnecting customer where the customer is taking its
9 business, noting that competitors could question whether such questioning by QC is anti-
10 competitive.⁸⁵

11 Staff’s request is vague. It is not clear whether the reports Staff requests in 8.b.1-3
12 are snapshots in time, or whether QC must track customers’ wanderings between QC and
13 QCC and potentially other carriers for three years.⁸⁶

14 Aside from the cost of the record-generation, the chilling effect the gathering of the
15 data may have on competition, and the vagueness of Staff’s request, it is clear from the
16 record that the data has doubtful value in relation to the purposes Staff articulates. First,
17 the data Staff requests will not enable Staff to understand the effect QCC’s business has
18 on the revenue of QC. Because the Enterprise Market is competitive, customers are not
19 locked into QC as a provider. Enterprise customers are free to choose from among a
20 number of telecom service providers and many have already chosen providers other than
21 QC.⁸⁷ Second, the customers can be expected to move their business between and among
22

⁸³ See *id.* at 146.

⁸⁴ See Supplemental Rebuttal Testimony of QCC Witness M. Lafave, Hearing Exhibit A-10 at 18 (lines 20-22). See also, Cross-examination of Qwest Witness M. LaFave, TR, Vol. II at 298-299.

⁸⁵ See Cross-examination of Qwest Witness M. LaFave, TR, Vol. I at 63-64.

⁸⁶ See Supplemental Rebuttal Testimony of QCC Witness M. Lafave, Hearing Exhibit A-10 at 18 (lines 13-18).

⁸⁷ See Supplemental Rebuttal Testimony of QCC Witness M. Lafave, Hearing

1 QC, QCC, and the other CLECs. No move is permanent; they are free to move their
2 business multiple times. The testimony of the QCC witness explains it well:

3 [L]et's just say QC loses a million dollars in revenue. Of that, at some point
4 in time a portion of that may have gone to QCC, but that also may have
5 been migrated to SBC or AT&T. The nature of a competitive market is that
6 individuals, enterprises, in this instance have a choice, and they tend to
exercise that choice. So even if QCC is successful on one day, they may in
turn lose that business to another competitor that's still going to have the
same adverse impact on the revenues that QC at one time had.⁸⁸

7 Because of customer movement between and among QC, other CLECs, and
8 QCC, the data Staff requests is ineffective to give Staff a true picture of
9 competition, because it only tracks one narrow category of competitive motion--
10 that of customers from QC to QCC at some point in time over a three year period.⁸⁹
11 Staff puts on blinders to all other competitive customer movements and to
12 subsequent customer changes, and the data it seeks cannot adequately prove any
13 effects QCC's entry has on QC-or give an accurate picture of competition in the
14 market.

15 2) The Iowa Reporting Alternative

16 Thus it is clear that the scheme of record-keeping and reporting proposed in Staff's
17 Second Report, Section III.8.b.1-3 is seriously flawed and should not be adopted.
18 However, QCC has pointed out an alternative data reporting plan that is viable.⁹⁰ In
19 December, 2004, the Iowa Utilities Board ("Iowa Board") granted QCC's application for
20 an amendment to its competitive local exchange carrier certificate that would allow it to
21 provide service inside the QC local exchange service territory. At the same time, the Iowa
22 Board indicated that it would initiate a general rulemaking, applicable to not just QC, but

23 Exhibit A-10 at 17-18.

24 ⁸⁸ See Cross-examination of Qwest Witness M. LaFave, TR, Vol. I at 72-73.

25 ⁸⁹ TR, Vol. I at 196 (lines 16-24).

26 ⁹⁰ Hearing Exhibit A-10 at 19-20. QCC filed this information in its Post-Hearing
Submissions, filed May 27, 2005. The Iowa Board information is attached to the
Post-Hearing Submission, marked as Exhibit 5 thereto.

1 any company with an affiliated ILEC and CLEC serving the same territory, to address
2 information the Iowa Board believed it would need. The upshot was a rule in Iowa
3 requiring “any ILEC that provides service in the same service territory as a CLEC with
4 which it is affiliated” to provide certain information.⁹¹

5 The ILEC is required to file all commercial agreements, not just interconnection
6 agreements, between the ILEC and the affiliated CLEC “as they are made.”⁹² The ILEC
7 must also file as part of its annual report the following information:

- 8 a. The number of local numbers ported by the ILEC to nonaffiliated CLECs.
- 9 b. The number of local numbers ported by the ILEC to its affiliated CLEC.
- 10 c. The number of unbundled network element loops (UNE-Ls) provided by the
11 ILEC to nonaffiliated CLECs.
- 12 d. The number of UNE-Ls provided by the ILEC to its affiliated CLEC.
- 13 e. The number of unbundled network element platforms (UNE-Ps), or their
14 equivalent, provided by the ILEC to nonaffiliated CLECs.
- 15 f. The number of UNE-Ps, or their equivalent, provided by the LEC to its
16 affiliated CLEC.
- 17 g. The number of resale access lines provided by the ILEC to nonaffiliated
18 CLECs.
- 19 h. The number of resale access lines provided by the ILEC to its affiliated
20 CLEC.
- 21 i. The number of central office collocation sites provided by the ILEC to
22 nonaffiliated CLECs.
- 23 j. The number of central office collocation sites provided by the ILEC to its

24 ⁹¹ In re: Revisions to Affiliate Reporting Rules [199 IAC 31], Docket No. RMU-05-3,
25 *Order Adopting Amendment*, May 17, 2005 (hereinafter “*Iowa Affiliate Reporting*
26 *Order*”), at 1.

⁹² *Iowa Affiliate Reporting Order*, at 2; 199 Iowa Administrative Code § 31.4(1).

1 affiliated CLEC.⁹³

2 QCC respectfully suggests that these reporting requirements are far better than
3 those recommended by Staff. These reporting requirements involve data that is captured
4 in the normal course of business, so the expense of developing new record systems can be
5 avoided.⁹⁴ Second, this reporting provides data regarding competitive line loss/gain or
6 growth for all CLECs, which gives Staff comparative data. Third, this procedure is the
7 correct one because it was adopted by way of a rulemaking applicable to all carriers.

8 c. Staff's Conditions in 8.b. 4. Are Unreasonable; the Purposes for the
9 Reports Do Not Relate to this Case

10 In the Second Staff Report, Section III.8.b.4, Staff recommends that every 6
11 months QC provide state-wide summarized listing data, containing all main listings and
12 additional line listings by QC, QCC, CLECs ILECs, Wireless Providers or Other for each
13 NPA-NXX, separated by residence and business. The reasons Staff gives for wanting this
14 information are inadequate.

15 Staff initially stated that the reason it seeks this data is to determine if QC, the
16 ILEC, was serving outside its service territory.⁹⁵ This is symptomatic of the greater
17 problem in this matter--Staff wants to use this case for any number of issues and concerns
18 other than the single question of whether QCC is a fit and proper applicant. Here, Staff
19 seeks to impose on a CC&N a reporting requirement that Staff will use to *evaluate the*
20 *compliance of a company other than the applicant, in a subject unrelated to the*
21 *Application.*

22 Staff states two other reasons for the state-wide listings data. However, they are
23 not persuasive either. First, Staff will look at the data to see if any of QCC's telephone

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25 ⁹³ *Iowa Affiliate Reporting Order*, at 2; 199 Iowa Administrative Code § 31.4(2).
26 ⁹⁴ *See Supplemental Rebuttal Testimony of Mary F. LaFave*, Hearing Exhibit A-10 at
^{20.}
⁹⁵ *See Cross-Examination of Staff Witness A. Fimbres*, TR, Vol. I at 137-138.

1 numbers are in the residence category. Thus, Staff sees this as a compliance check.
2 However, that does not answer the question of why QC should routinely produce the data,
3 and it does not answer the question of why the listings data should cover every provider or
4 wireline and wireless state-wide. Staff is over-reaching.

5 The final inadequate reason Staff seeks the state-wide listings data is for Staff to
6 analyze the state of competition⁹⁶ with a view toward the next QC AFOR case.⁹⁷ This
7 Staff purpose does not have anything to do with QCC, its fitness, or this CC&N. In this
8 instance, Staff will use the data to evaluate competition on an area by area basis, to figure
9 out the extent which that area is competitive. This is an improper purpose in this case.
10 Staff should take this subject up in a future QC AFOR case, or in a generic docket dealing
11 with the status of competition. *See Generic Investigation of Competition in Arizona*
12 *Telecommunications Markets*, Docket No. T-000001-04-0749.

13 d. Staff's Conditions in 8.b. 5 Are Unreasonable; the Purposes for the
14 Reports Do Not Relate to this Case; Staff Can Subscribe to the LERG
to Obtain Data.

15 In the Second Staff Report, Section III.8.b.5, Staff recommends that every 6
16 months QC must provide state-wide summarized Local Exchange Routing Guide
17 ("LERG") detailed information for all switches in the state, for all switch owners in the
18 state, including all NPA NXXs assigned to each switch. Staff's rationale for this LERG
19 data report is much the same as its reasons for the state-wide listings data--to evaluate the
20 state of competition in Arizona, with a view toward a future QC AFOR case.⁹⁸ Staff's
21 request should be denied for the same reasons as stated above.

22 With regard to the LERG data however, there is another reason Staff's request is
23 unreasonable. The evidence shows that Staff, as an arm of a state regulatory agency, may
24

25 ⁹⁶ See *id.*; TR, Vol. I at 139-140.

26 ⁹⁷ See *id.*; TR, Vol. I at 143-144.

⁹⁸ See *id.*

1 subscribe directly to the LERG, and that such access is often times free of charge by the
2 database maintenance organization, Telcordia.⁹⁹

3 **D. The Limited Waiver of Rule 803 Previously Granted to Qwest Should Not Be**
4 **Altered; Rule 803's Purposes Are Well-Served.**

5 By Procedural Order, issued on July 11, 2005, the ALJ asked the parties to address
6 the following question:

7 If Staff's recommendations in its supplemental Staff Report are adopted,
8 why is it unnecessary for the Commission to look at the current waiver from
9 the affiliated interest rules held by QCC's parent Qwest Corporation
10 ("Qwest"), given that Qwest's competitive affiliate would be allowed to
11 compete head-to-head for Qwest's regulated business? In responding to this
12 question, the parties should address the purpose of the affiliated interests
13 rules, and what the risk and benefits are of keeping the waiver in place.

14 1. The Purpose of the Affiliated Interests Rules and the History of the Limited
15 Waiver, Which Has Been in Effect Since 1992.

16 Taken as a whole, the essential purpose of the affiliated interests rules is to prevent
17 utilities from endangering their assets through transactions with affiliates.¹⁰⁰ The
18 affiliated interests rules primarily consist of 3 rules, codified in the Arizona
19 Administrative Code as R14-2-803, 804 and 805. A.A.C. R14-2-803 ("Rule 803")
20 governs the organization or reorganization of public utility holding companies, and
21 provides that the Commission shall be notified of and approve, of the organization or
22 reorganization of a public utility holding company. A.A.C. R14-2-804 ("Rule 804")
23 requires Commission review of transactions between public utilities and affiliates and
24 requires Commission approval of certain such transactions. A.A.C. R14-2-805 ("Rule
25 805") imposes certain annual filing requirement of diversification activities and plans.
26 The limited waiver in question has been in place for Qwest since 1992.¹⁰¹ As discussed

⁹⁹ Hearing Exhibit A-10 at 20 (lines 18-22); TR, Vo II at 309.

¹⁰⁰ See Hearing Exhibit A-10 at 2, and Hearing Exhibit S-5 at 2.

¹⁰¹ The waiver in question was granted under Commission Decision No. 58087 in 1992 to the BOC U S WEST Communications, Inc. (now named Qwest Corporation) and ultimate parent company U S WEST, Inc. (now named Qwest Communications International Inc.). Subsequently, in 2002 the Commission examined the appropriateness

1 below, it is a limited waiver of the requirements of Rule 803 only. The limited waiver
2 does not extend to Rules 804 and 805.

3 2. QCC's Application Does Not Implicate Rule 803 or the Limited Waiver; No
4 Reason Exists to Re-examine the Limited Waiver.

5 Rule 803 applies to "any utility or affiliate intending to organize a public utility
6 holding company or *reorganize an existing public utility holding company*."¹⁰² The term
7 "reorganize" is defined in the affiliated interests rules:

8 "Reorganize" or "Reorganization." The acquisition or divestiture of a
9 financial interest in an affiliate or a utility or reconfiguration of an existing
10 affiliate or utility's position in the corporate structure or the merger or
11 consolidation of an affiliate or a utility.¹⁰³

12 Staff¹⁰⁴ and QCC both conclude that *QCC's request to compete is not a*
13 *reorganization* under the rules. The pending QCC Application does not involve a change
14 in the corporate structure of the Qwest companies. QCC already exists; no merger or
15 consolidation is involved.¹⁰⁵ Furthermore, the capital needs of QC, and the current
16 methods of capitalization will not need to be changed when QCC proceeds with its
17 business plan; there will be no assignment or conveyance of customers or revenues from
18 QC to QCC, and no transfer or lease of QC assets to QCC is involved.¹⁰⁶ Should there
19 come a time when there is a "reorganization" QCC will follow the rule. As stated by
20 Qwest's witness:

21 I do not foresee that there will be a proposed transaction of the type or kind
22 about which notice of intent is required or given under Rule 803.
23 Obviously, the Waiver does not come into play if the underlying rule does

24 of the limited waiver in light of QCC's intent to provide competitive interexchange
25 services. In Decision No. 64654 the Commission reaffirmed that the limited waiver of
26 Rule 803 applies unaltered to QCC, QC, their affiliates and parent Qwest
Communications International Inc.

¹⁰² A.A.C. R14-2-803(A) (emphasis added).

¹⁰³ A.A.C. R14-2-801(5).

¹⁰⁴ See Hearing Exhibit S-5 at 4, (lines 23-24). See also, TR, Vol. II at 246.

¹⁰⁵ See Hearing Exhibit A-10 at 11 (lines 11-15).

¹⁰⁶ See *id.* at 11-12.

1 not apply. If, there is a reorganization in the future, it will have to be
2 noticed to the Commission if it falls outside the scope of the waiver

3 This is consistent with Staff's view of how the Rule 803 and the limited waiver
4 work, as well. In 2002, in connection with the application of QCC for transfer of a CC&N
5 from an affiliate, Staff reported favorably on how the limited waiver had worked,
6 essentially noting that in practice the limited waiver had not screened Commission review
7 of any significant transactions:

8 In its Staff Report, Staff states that the partial waiver of the Rules granted to
9 USWCI and its affiliates indecision No. 58087 has served as a safety net
10 through which transactions inconsequential to Arizona have passed, while
11 larger transactions with more significant consequences to the Arizona
12 jurisdiction have been processed. Staff listed several transactions that have
13 required Commission approval under the limited waiver. These transactions
14 include the USWI acquisition of a partnership interest in Time Warner
15 Entertainment, L.P., the divestiture of USWCI's interest in Bell
16 Communications Research, Inc., and the separation of the U S WEST
17 Communications Group from the U S WEST Media Group.

18 At the hearing, the point that the limited waiver does not shield important
19 transactions from Commission review under Rule 803 was emphasized by further
20 examples of matters that were brought before the Commission for review and approval,
21 including the U S WEST/Qwest merger, and the sale of the directory publishing
22 business.¹⁰⁷

23 Since there is not a reorganization, Rule 803 is not implicated; since Rule 803 is
24 not implicated, the limited waiver is not implicated, and it is unnecessary to amend the
25 limited waiver.

26 3. Staff's Position that the Limited Waiver Should Be Narrowed If Staff's
Proposed Conditions Are Not Adopted, Fails to Justify Those Conditions,
and Is Not Rationally Connected to Rule 803.

The Commission should note here, and take comfort as it did from Staff's report¹⁰⁸

¹⁰⁷ See Cross-Examination of Staff Witness E. Abinah, TR, Vol. II at 247.

¹⁰⁸ The Staff report urged that the Commission uphold the limited waiver without amendment, and the Commission so ordered. The Order includes findings from the Staff report that are directly relevant today in this proceeding:

1 recited in Decision No. 64654, that there are a number of other safeguards in place
2 protecting QC's ratepayers and competitors. Staff now attempts, unconvincingly, to
3 distance itself from its earlier view of the waiver, in an effort to provide some rational
4 justification for the unreasonable conditions it recommended in the Second Staff Report.
5 While acknowledging that there is no "reorganization" involved in QCC's Application,
6

7
8 21. Staff indicates that the restrictions and requirements that the
9 Telecommunications Act of 1996 ("Act") sets in place concerning Bell Operating
10 Companies ("BOCs"), such as Qwest Corporation, and their transactions with
11 affiliates that provide competitive services, provide a layer of oversight in addition
12 to the Rules. Section 272 of the Act will require Qwest Corporation and its
13 competitive in-region interLATA telecommunications services provider, or
14 "Section 272 Affiliate" to keep separate books, records and accounts, and to have
15 separate officers, directors and employees. Section 272 of the Act will also require
16 that all transactions between the entities are arms-length transactions. In addition,
17 the Act prohibits a Section 272 affiliate from obtaining credit under any
18 arrangement that would give a creditor recourse to the assets of a BOC such as
19 Qwest Corporation.

20
21 22. Staff explained in the Staff Report that under the Act, a BOC with Section
22 272 affiliates is required to obtain and pay for a joint Federal/State audit every two
23 years conducted by an independent auditor to determine whether the BOC has
24 complied with Section 272 of the Act, and that the results of the audit must be
25 submitted to the Federal Communications Commission ("FCC") and the State
26 commission of each state in which service is provided.

27
28 23. The Staff Report pointed out that in a Report and Order released on
29 December 24, 1996, the FCC adopted accounting safeguards related to the Act.
30 Staff stated that those safeguards prescribe how incumbent local exchange carriers
31 such as Qwest Corporation must account for transactions with affiliates, and how
32 costs incurred in the provision of both regulated telecommunications services and
33 non-regulated services are allocated.

34
35 24. Staff believes that the previous waiver granted to USWCI in Decision 58087
36 has provided adequate protection of Arizona ratepayers from costs related to
37 affiliates. Staff also believes that in the event QCII and its affiliates receive
38 approval to provide in-region interLATA service in Arizona through a Section 272
39 affiliate, that Section 272 of the Telecommunications Act of 1996 will provide
40 additional protection.

41
42 *Order, In the Matter of the Application of Qwest Communications Corporation for*
43 *Approval of transfer of Certificates of Authority In Association With Internal Corporate*
44 *Restructuring, Docket No T-01051B-01-0456, Decision No. 64654 (Ariz. Corp. Com'n,*
45 *2002), at 5-6.*

1 Staff states that if all of the conditions contained in Staff's alternative recommendations
2 relating to QCC's CC&N are not adopted, Staff would seek to re-examine the limited
3 Rule 803 waiver and recommend that the "exemption be significantly narrowed in that
4 event so that any *reorganization* that was likely to have any impact upon the Arizona
5 operations of Qwest be subject of review *in the future*, or that the waiver be eliminated
6 entirely."¹⁰⁹

7 QCC agrees with Staff in one very narrow sense. If there is to be a re-examination
8 of the limited waiver, it needs to be done via a proceeding in which that question is
9 squarely tried, and the parties have the opportunity to explore all the issues in a manner
10 that meets fundamental due process. The Commission should not casually throw this
11 important question on the end of a CC&N case. However, such a proceeding is
12 unnecessary. Staff's linkage of their recommended conditions to the limited waiver and
13 Rule 803 is artificial and illogical. As demonstrated above, the limited waiver does not
14 foreclose review of any "reorganization" of any consequence to Arizona either now or in
15 the future.

16 Staff suggests that the grant of the CC&N to QCC will raise "many of the same
17 concerns identified by all sections of the rules, including A.A.C. R14-2-803, *i.e.*, whether
18 QCC's ability to take away customers from QC will 'impair the financial status of the
19 public utility, otherwise prevent it from attracting capital at fair and reasonable terms, or
20 impair the ability of the public utility to provide safe, reasonable and adequate
21 service.'"¹¹⁰ The Commission must reject this side-door attempt to re-write Rule 803.
22 QCC's winning of a customer is not a "reorganization."

23 Regardless, there is no foundation for Staff's assertion that QCC's business will
24 impair the financial status of QC, otherwise prevent it from attracting capital at fair and

25 ¹⁰⁹
26 ¹¹⁰ See Hearing Exhibit S-5 at 5 (lines 6-17) (emphasis added).
See *id.* at 4-5.

1 reasonable terms, or impair its ability to provide safe, reasonable and adequate service.

2 (See *infra* at Section II.E.4-5.)

3 **E. Granting the CC&N Will Enhance Competition in the Enterprise Market, Is**
4 **Consistent With National Policy, and Is In the Public Interest.**

5 1. National Telecommunications Policy Favors the Offering of Local
6 Exchange Service by BOC Section 272 Affiliates.

- 7 a. The FCC Ruled that "Regulations Prohibiting BOC Section 272
8 Affiliates From Offering Local Exchange Service Do Not Serve the
9 Public Interest."

10 As noted, one of the purposes of the Act is to open local telecommunications
11 markets to competition. The Federal Communications Commission ("FCC") concluded
12 early on that those pro-competitive purposes were served by allowing BOC section 272
13 affiliates such as QCC to provide local exchange services:

14 *We also conclude as a matter of policy that regulations prohibiting BOC*
15 *[Bell Operating Company] section 272 affiliates from offering local*
16 *exchange service do not serve the public interest. The goal of the 1996 Act*
17 *is to encourage competition and innovation in the telecommunications*
18 *market. We agree with the BOCs that the increased flexibility resulting*
19 *from the ability to provide both interLATA and local services from the same*
20 *entity serves the public interest, because such flexibility will encourage*
21 *section 272 affiliates to provide innovative new services. To the extent that*
22 *there are concerns that the BOCs will unlawfully subsidize their affiliates or*
23 *accord them preferential treatment, we reiterate that improper cost*
24 *allocations and discrimination are prohibited by existing Commission rules*
25 *and sections 251, 252 and 272 of the 1996 Act, and that predatory pricing is*
26 *prohibited by the antitrust laws. Our affiliate transaction rules, as modified*
by our companion Accounting Safeguards Order, address the BOCs' ability
to engage in improper cost allocation. The rules in this Order and our rules
in our First Interconnection Order and our Second Interconnection Order
ensure that BOCs may not favor their affiliates. In sum, we find no basis in
the record for concluding that competition in the local market would be
harmful if a section 272 affiliate offers local exchange service to the public
*that is similar to local exchange service offered by the BOC.*¹¹¹

111 *In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271*
and 272 of the Communications Act of 1934, as amended, First Report and Order and
Further Notice of Proposed Rulemaking, 11 FCC Rcd. 21095, FCC Release No. 96-489,
¶ 315 (1996) ("Section 272 Non-Accounting Safeguards Order") (emphasis added).

1 The FCC's declaration is unambiguous. Adoption of Staff's proposed prohibitions
2 against QCC, a section 272 affiliate, from offering local exchange service, is *contrary to*
3 *the public interest*. As a matter of national public policy, the Commission should reject
4 Staff's first alternative put forth in the First Staff Report, because it would prohibit QCC
5 from providing local exchange service to any customers in a huge part of the State of
6 Arizona. Likewise, the Commission should reject Staff's recommendation that QCC
7 should be prohibited from filing an application to amend its certification to provide local
8 exchange services to residence and/or small business customers in the QC service area in
9 Arizona for a period of 24 months.

10 b. All Other States in QC's Region Permit QCC to Provide Local
11 Exchange Services in QC's Service Area.

12 Save for this Application which is still pending, all of the other states in the 14
13 state region in which QC provides local exchange services have granted QCC the
14 authorization to operate in QC service areas.¹¹² This bears out the national policy
15 formulated by the FCC.

16 Two of those states, Iowa and Nebraska, have promulgated rules of general
17 applicability to telecommunications carriers, in rulemakings distinct from the QCC
18 certification proceedings.¹¹³ The Nebraska Public Service Commission ultimately
19 adopted rules requiring any ILEC with a CLEC affiliate operating in its incumbent
20 territory to file agreements between the ILEC and the affiliated CLEC as they are made,
21 and also to annually file the number of resale access lines provided by the ILEC to its
22 affiliated CLEC.¹¹⁴ The Iowa rule, which is discussed at greater length in Section
23 III.C.5.b.2, *supra*, provides for reports to be created from systems and data that are

24
112 Hearing Exhibit A-10 at 27-29.

113 *See id.* at 28 (lines 13 *et seq.*).

114 *See id.* citing Order Issuing Certificate of Adoption, Rule and Regulation 164,
26 (Nebr. PSC, June 7, 2005).

1 currently available. Neither state's rule supports Staff's recommended restrictions or
2 conditions. Rather, the Nebraska and Iowa rules reflect on the unreasonableness of Staff's
3 recommendations and the availability of efficient alternatives.

4 2. QCC's Entrance into the Enterprise Market Will Benefit Customers and
5 Competition.

6 The evidence clearly supports QCC's entrance into the Enterprise Market because
7 such entrance will benefit customers and enhance the competitiveness of that Market. As
8 noted above in Section II.C. at 8, QCC seeks authorization to serve the Enterprise Market
9 because currently no Qwest company can provide both local and interLATA services.
10 The business purpose behind this Application is to enable the Section 272 affiliate--the
11 only Qwest company that may legally be so enabled--to enter the market for both local
12 exchange services and interLATA services. This is critical, because the availability to
13 have "one-stop shopping," whereby the customer can secure a full suite of services, local
14 and long distance, from a single provider, with a single point of contact, one bill, and a
15 single entity responsible and accountable for performance, is very important to many
16 Enterprise customers.

17 The Staff agrees that Enterprise customers "typically" want one-stop shopping.¹¹⁵
18 Staff agrees also that if QCC is allowed to provide service in QC's territory, Enterprise
19 customers will have one more choice in addition to AT&T, MCI and other providers
20 where they can get one-stop shopping, and that this development is consistent with the
21 role of the Telecom Act and the role of this Commission to encourage competition.¹¹⁶ As
22 Staff stated in the Second Staff Report, "The Enterprise Market may, in fact, welcome
23 another competitor since QC's presence in the Enterprise market has substantially
24 diminished. . . . Additional competitive alternatives for the Enterprise market appear to

115 See, Cross-examination of Staff witness E. Abinah, TR, Vol. II at 248 (lines 17-19).
116 See, *Id.* pp. 248-249.

1 have more upside than downside.”¹¹⁷

2 3. The Benefits to Customers and to Competition Are the Answer to the ALJ’s
3 Question Why QCC Should Be Allowed to “Take” QC Customers.

4 In the Procedural Order, issued July 11, 2005, the ALJ asked the parties to address
5 “Why should QCC be allowed to take customers and their associate revenues away from
6 [QC]?” QCC responds in two parts; here, QCC responds to the question as it relates to
7 “taking customers;” below QCC will address the question as it relates to revenues.

8 It is important to understand that QCC will have to *win over* customers. Customers
9 will not be simply transferred, assigned or “slammed” by QCC. As was explained by
10 QCC witness M. LaFave, “QC will not move its customers and it cannot do so legally.
11 Rather, QCC will compete for a subscriber’s business. Customers who want to switch to
12 QCC will be entering a new provider / subscriber relationship, just as would be the case
13 when a non-affiliate provider wins the customer’s business.”¹¹⁸

14 More fundamentally, however, the answer to the ALJ’s question is that (1) granting
15 QCC’s certificate is entirely consistent with national public policy, as discussed above,
16 and (2) winning-over customers is exactly what happens with the advent of competitors
17 and the development of competitive markets. QCC’s answer to the ALJ’s question was
18 well-explained by QCC witness M. LaFave:

19 QCC should be allowed to take customers from QC and from other
20 carriers because the national and state telecommunications policy favors
21 innovation, customers having the ability to choose among carriers and
22 competition. As I previously testified, the FCC specifically addressed this
23 situation and ruled that permitting a BOC affiliate to provide both
interLATA and local services from a single entity will serve the public
interest by encouraging deployment of new and innovative services. Any
concerns about accounting and discrimination are fully addressed by FCC
accounting rules, audits under Section 272 as well as specific non-
discrimination rules under Section 272.

24 Implicit in the Staff’s argument giving rise to this question are

25 ¹¹⁷
26 ¹¹⁸ Hearing Exhibit S-2 at 2.
Hearing Exhibit A-10 at 21 (lines 9-14).

1 assumptions that the market is static and that QC is a monopoly. Neither
2 assumption is correct. Further, the question does not recognize that the
3 Second Supplement to the Application limits the CC&N request to the
4 enterprise market. Because the enterprise market is competitive, enterprise
5 customers are free to choose from among a number of telecom service
6 providers, and a large number have already chosen providers other than QC.
7 As Staff correctly noted in its supplemental report dated May 13, 2005, the
8 Enterprise market is "a market segment in which it [QC] has diminished
9 presence. Id. p. 3. Staff also concluded in its supplemental report dated
10 May 13, 2005, "The Enterprise Market is highly competitive." Hearing
11 Exhibits S-2, p. 2. Because enterprise customers have left QC, or may
12 freely do so, the question is not whether QCC should be allowed to take
13 customers from QC, but rather whether any Qwest company will be allowed
14 to try to successfully compete in the enterprise market against large well-
15 funded carriers that currently focus on this market segment.¹¹⁹

9 4. The Effect on QC's Revenues

10 In the Procedural Order, issued on July 11, 2005, the ALJ asked the parties to
11 address "If QCC is allowed to compete with QC in the local market for enterprise
12 customers, how should QC and QCC revenues be treated from a ratemaking perspective?
13 What will the effect be on QC's future rates and revenues?"

14 QCC respectfully submits that this question is not before the Commission in this
15 CC&N proceeding, and that it is improper to bring it here. The question regarding
16 treatment of revenues for ratemaking is clearly outside the scope of this Application. As
17 noted by QCC witness M. LaFave,

18 To the extent there is a concern about the effect QCC's operations have on
19 QC's financial condition, the appropriate venue would be before the
20 Commission in a future wholesale cost / rates docket, rate case or AFOR
21 proceeding where issues can be addressed on a fact specific basis taking all
22 of the competitive effects into account, not just the consequences of QCC
23 operations.¹²⁰

24 Without waiving its objection, QCC states that, as explained by witness M.
25 LaFave,¹²¹ QCC's entry into the Enterprise Market will not have any impact on the
26 revenue and financial viability of QC differently than the loss of Enterprise customers to

119 Hearing Exhibit A-10 at 21-22.

120 Id. at 24 (lines 23-26) and at 25 (lines 1-3).

121 Id. at 23-25.

1 competition has had generally on QC. There is fierce competition in the Arizona market;
2 as of July 2005, QCC calculates there were 144 providers of telecom services targeting
3 only business customers.¹²² To the extent that those competitors provide local exchange
4 services to their subscribers over their own facilities, QC is bypassed and receives no
5 revenue whatsoever. To the extent that those competitors provide services to their
6 subscribers over the facilities of QC through wholesale service arrangements, QC is
7 compensated for that use at rates established or approved by the Commission.¹²³

8 When QCC enters the local exchange business, rather than construct new local
9 facilities where QC has facilities, QCC will incorporate QC network facilities or services
10 into the QCC network, through purchasing QC retail services at tariff rates, through
11 purchasing QC services for resale, or through purchasing unbundled network elements
12 from QC.¹²⁴

13 Revenues QC derives from QCC in that fashion are typically referred to as
14 “wholesale revenue” and are a significant revenue stream. In fact, in a current proceeding
15 before the Commission involving QC’s AFOR Plan, a consultant testifying on behalf of
16 Staff points to what the consultant calls “considerable new and growing revenues” for QC
17 “by serving many of its departing retail customers on a wholesale basis.”¹²⁵

18 It is important to note that wholesale rates are established or approved by the
19 Commission, and the Commission has found that those rates are just and reasonable, and
20 adequately compensate QC. Regardless, the question about the treatment of the revenues
21 must be done in a QC rate proceeding. It is wholly improper to address those issues in
22 this QCC proceeding, and wholly improper to run this CC&N aground because of possible
23

24 ¹²² *Id.* at 5 (lines 9-13).

25 ¹²³ *Id.*

26 ¹²⁴ *Id.* at 24.

¹²⁵ See Excerpt of Surrebuttal Testimony of Michael L. Brosch, Docket No. T-01051B-03-0454, *et al.*, Hearing Exhibit A-11 at 4.

1 future rate making cases.

2 5. Effect on QC's Maintenance

3 In the Procedural Order, issued on July 11, 2005, the ALJ asked the parties to
4 address how the Commission can insure that maintenance and expansion of QC's
5 infrastructure will not suffer as a result of allowing QCC to enter the local exchange
6 business. As discussed, the evidence clearly shows that QC is not a monopoly, the
7 Enterprise Market is highly competitive, and Enterprise customers have already left and
8 are continuing to leave QC. That said, the evidence presented in response to this question
9 compels the conclusions that competition causes QC's marginal maintenance expense to
10 decline. As QCC witness M. LaFave points out,¹²⁶ QC's maintenance expenses are, in
11 part, a function of the number of customers it serves. One can reasonably expect that
12 QC's maintenance expenses will decrease as QC loses customers to other providers,
13 regardless of whether that provider is QCC or an unaffiliated CLEC.

14 That consequence of competition is known to Staff, and formed the basis for
15 testimony in QC's current AFOR case. Specifically, the consultant testifying on behalf of
16 Staff stated in that case as follows:

17 With respect to competition, it is obvious that Intrastate revenues have
18 declined considerably since the inception of the Plan, due to both volume
19 reductions associated with competition and economic conditions as well as
20 the price reductions implemented pursuant to the Plan. However, Qwest has
21 managed to reduce its cost levels and maintain revenues at levels adequate
22 to produce adequate returns on Intrastate rate base investment on after
23 adjustments to normalize test year information. As noted above, Arizona
24 Intrastate cash flows are strong and more than adequate to service the
25 existing high debt levels reasonably allocated to Arizona.¹²⁷

26 Regardless, there are regulatory requirements and competitive pressures that
compel QC to properly maintain its network in Arizona. By way of the QC Service

126 See Hearing Exhibit A-10 at 25-26.

127 See Excerpt of Direct Testimony of Michael L. Brosch, Docket No. T-01051B-03-0454, *et al.*, Hearing Exhibit A-12 at 6.

1 Quality Tariff, the Commission has established a process for dealing with poor
2 maintenance, including the possibility of significant financial penalties and/or credits to
3 customers if QC's performance declines. Further, both the current AFOR plan, as well as
4 the proposed Plan included in the Settlement Agreement in Docket No.
5 T-01051B-03-0454, contain penalties that are in addition to those included in Qwest's
6 tariff should service quality levels decline. Second, the presence of aggressive
7 competitors in the Arizona market requires QC to maintain a high quality of service if it is
8 to compete successfully. This combination of regulatory oversight and competitive
9 pressure provides adequate assurance that QC will continue to adequately maintain its
10 network.¹²⁸

11 IV. CONCLUSION

12 For the foregoing reasons, QCC respectfully submits that the Commission should
13 issue its order approving QCC's Application, and should reject Staff's recommended
14 restrictions and conditions.
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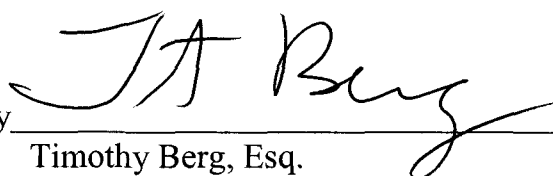
26 ¹²⁸ See Hearing Exhibit A-10 at 25-26.

1 RESPECTFULLY SUBMITTED, this ^{30th} day of September, 2005.

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8 -and-

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EXHIBIT

A

1 **BEFORE THE ARIZONA CORPORATION COMMISSION**

2
3 **JEFF HATCH-MILLER**
 Chairman
4 **WILLIAM MUNDELL**
 Commissioner
5 **MARC SPITZER**
 Commissioner
6 **MIKE GLEASON**
 Commissioner
7 **KRISTIN MAYES**
 Commissioner
8

9 IN THE MATTER OF THE
10 APPLICATION OF QWEST
11 COMMUNICATIONS CORPORATION
12 D/B/A QWEST LONG DISTANCE FOR
13 EXTENSION OF ITS EXISTING
14 CERTIFICATE OF CONVENIENCE AND
15 NECESSITY TO INCLUDE AUTHORITY
16 TO PROVIDE RESOLD AND
17 FACILITIES-BASED LOCAL
18 EXCHANGE AND RESOLD LONG
19 DISTANCE SERVICES IN ADDITION
20 TO ITS CURRENT AUTHORITY TO
21 PROVIDE FACILITIES-BASED LONG
22 DISTANCE SERVICES, AND PETITION
23 FOR COMPETITIVE CLASSIFICATION
24 OF PROPOSED SERVICES WITHIN THE
25 STATE OF ARIZONA
26

DOCKET NO. T-02811B-04-0313

QWEST COMMUNICATIONS
CORPORATION'S RESPONSE TO
STAFF REPORT

21 Qwest Communications Corporation, Inc. ("Qwest") hereby files its Response to
22 the Staff Report, which was filed by the Arizona Corporation Commission Staff ("Staff")
23 in this docket, pursuant to the Procedural Order dated February 1, 2005.
24
25
26

1 **I. INTRODUCTION**

2 As a beginning point for examining QCC's Application and Staff's Report, it is helpful to
3 observe what is not present in this docket. First, Staff's only objection to QCC's application is to
4 suggest that QCC should be excluded from operating in QC territory. Staff does not question
5 QCC's technical, financial, or managerial abilities to provide competitive local exchange
6 telephone service. Indeed, of the twenty-eight paragraphs of recommendations included in
7 section 6.1 of the Report, only one, ¶ 19, recommends any limitations or conditions on QCC's
8 certificate that are materially different from conditions applied to other CLECs' certificates.

9 Second, it is important to note that Staff's Report provides no evidence to back up any of
10 its concerns. Staff hypothesizes five "unresolved concerns" at page 8 of its Report, but provides
11 no evidence that QCC has engaged in any such conduct, or has the opportunity or motivation to
12 do so. To the contrary, most of the anti-competitive behavior Staff expresses concern about is
13 already prohibited by both Arizona and federal law. For the Commission to follow Staff's
14 recommendation and bar QCC from competing for most customers in Arizona because of
15 unsubstantiated fears that QCC would engage in unlawful conduct would be arbitrary,
16 capricious, and illogical.

17 Third, it is notable that no competing carrier has intervened and argued that QCC's
18 statewide presence and operation as a CLEC would be unlawful, harm competition, or be adverse
19 to the public interest. Staff's single objection is raised in a vacuum of protest from the entities
20 Staff claims would suffer most if QCC acted against the law: QCC's competitors. This silence
21 of intervention speaks loudly against the credibility of the concerns Staff raises in its Report.

22 What *is* present and undisputed in QCC's application is the fact that because of their
23 organizational limitations, QC and QCC presently are restricted from segments of the market
24 their competitors are not: the business or governmental entity that wants interLATA services and
25 local exchange services from a single provider, with a single point of contact, and a single bill.
26 Permitting QCC to operate statewide, rather than providing an unfair competitive advantage as

1 Staff speculates, will instead level the playing field so that QCC can compete for these customers
2 on an equal footing compared to its competitors. Adding QCC to the competitive landscape will
3 increase competition, and therefore serves the public interest.

4 **II. ARGUMENT**

5 **A. Staff's Proposal Effectively Excludes QCC from Competing in Arizona in Violation** 6 **of 47 USC § 253.**

7 Although Staff proposes only a single limitation on QCC's certificated authority, the
8 condition Staff recommends would, as a practical matter, exclude QCC from the Arizona
9 marketplace. QC incumbent territory encompasses Arizona's largest cities and the vast majority
10 of its citizens. The territory where QC is not the incumbent is largely served by independent
11 ILECs, many of which could refuse to sell network elements or make their retail
12 telecommunications services available for resale at a discount to QCC pursuant to the so-called
13 "rural exemptions" of section 251(f) of the federal Telecommunications Act (the "Act"). Thus,
14 QCC would as a practical matter be excluded from operating as a CLEC even in the
15 limited area for which Staff recommends approval, unless it builds its own facilities. This
16 practical prohibition on QCC's operations would violate section 253 of the Act:

17 No State or local statute or regulation, or other State or local legal requirement,
18 may prohibit or have the effect of prohibiting the ability of any entity to provide
any interstate or intrastate telecommunications service.¹

19 Section 253 bars states not only from prohibiting entities like QCC from providing
20 telecommunications service, but also from regulating QCC in such a way that it has the effect of
21 prohibiting QCC from providing telecommunications service. Staff proposes that this
22 Commission do both.

23 The Staff's recommendation not only violates federal law, it is unsupported by law,
24 policy, or the facts. In point of fact, Staff examined the relationship between QCC and QC to
25 ensure compliance with federal law and this Commission's orders in Decision No. 66612 and

26 ¹ 47 USC § 253.

1 64654, and found that both QC and QCC have largely complied with these orders.² As discussed
2 in more detail below, Staff's recommendations are arbitrary and capricious in light of this failure
3 of evidence. After erroneously raising its concerns, Staff then proceeds to discuss its view of the
4 state of the law regarding Bell Operating Company ("BOC") affiliates providing competitive
5 local exchange services in the BOCs' incumbent territory. However, that discussion provides an
6 incomplete and inaccurate picture of the state of the law.

7 **B. Staff's Report Inaccurately Describes Current Law.**

8 Staff points to paragraph 312 the FCC's 1996 *Section 272 Non-Accounting Safeguards*
9 *Order*³ in connection with the contention that section 272 of the federal Act resolves some, but
10 not all, of its listed concerns. That paragraph concludes that section 272 does not prohibit BOC
11 affiliates from offering long distance service. Staff fails, however, to point out the FCC's
12 discussion of affiliated CLEC competition and the public interest, three paragraphs later:

13 *We also conclude as a matter of policy that regulations prohibiting BOC [Bell*
14 *Operating Company] section 272 affiliates from offering local exchange service*
15 *do not serve the public interest.* The goal of the 1996 Act is to encourage
16 competition and innovation in the telecommunications market. We agree with the
17 BOCs that the increased flexibility resulting from the ability to provide both
18 interLATA and local services from the same entity serves the public interest,
19 because such flexibility will encourage section 272 affiliates to provide innovative
20 new services. *To the extent that there are concerns that the BOCs will*
21 *unlawfully subsidize their affiliates or accord them preferential treatment, we*
22 *reiterate that improper cost allocations and discrimination are prohibited by*
23 *existing Commission rules and sections 251, 252 and 272 of the 1996 Act, and*
24 *that predatory pricing is prohibited by the antitrust laws.* Our affiliate
25 transaction rules, as modified by our companion Accounting Safeguards Order,
26 address the BOCs' ability to engage in improper cost allocation. The rules in this
Order and our rules in our First Interconnection Order and our Second
Interconnection Order ensure that BOCs may not favor their affiliates. *In sum, we*
find no basis in the record for concluding that competition in the local market
would be harmed if a section 272 affiliate offers local exchange service to the
*public that is similar to local exchange service offered by the BOC.*⁴

23 ² Staff Report, at 5. Staff stated that it believed that some of the filings had been made late, but found no evidence
24 of any anticompetitive behavior, which was the basis for the requirement to file all affiliate contracts.

25 ³ *In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the*
26 *Communications Act of 1934, as amended*, First Report and Order and Further Notice of Proposed Rulemaking, 11
FCC Rcd. 21095, FCC Release No. 96-489, ¶ 315 (1996) (*Section 272 Non-Accounting Safeguards Order*). A
copy is attached as *Appendix A*.

⁴ *Section 272 Non-Accounting Safeguards Order*, ¶ 315 (1996)(emphasis added).

1 The FCC reached these conclusions in 1996 – when wireless communications barely dented the
2 telecommunications market, before cable giants like Cox Telecom had begun to erode BOC
3 market share, and before the Act enabled a passel of wholly and partially facilities-based carriers
4 to use Qwest's facilities to compete for Qwest's customers. Nine years later, Staff relies on the
5 same rejected concerns the FCC addressed in 1996, and instead of proposing an approach to
6 regulating QCC's entry that would allow QCC to compete on relatively equal footing while
7 making sure QC and QCC continued to follow federal and state law,⁵ Staff proposes a total ban
8 on QCC's presence in the vast majority of Arizona.

9 Staff also overstates the states' laws bases for its draconian recommendation. For
10 example, Staff argues that only "*some* states within Qwest's in-region footprint" (emphasis
11 added) permit BOC CLEC affiliates to operate in BOC incumbent territory. But at the time Staff
12 issued its Report, thirteen states where QCC has requested authority to operate in QC incumbent
13 territory had given QCC that authority. Arizona's pending application is the only exception.

14 Three states, Iowa, North Dakota, and Nebraska, have directly addressed disputes
15 regarding whether QCC should be allowed to operate in QC incumbent territory. The Iowa
16 Utilities Board, after considering objections from the Iowa Office of the Consumer Advocate and
17 interveners almost identical to Staff's concerns here,⁶ concluded that granting QCC authority to
18 compete in QC territory was in the public interest.⁷ In North Dakota, the Public Service
19 Commission determined that allegations of consumer confusion were largely unfounded in view

20 ⁵ Such an approach would be consistent with paragraph 317 of the *Section 272 Non-Accounting Safeguards Order*,
21 which permits states to regulate such CLECs differently than other carriers. No FCC ruling or other law permits the
Staff recommendation of abandoning "regulation" altogether and barring QCC from QC incumbent territory
outright.

22 ⁶ Those objections included that competition between affiliates is not true, "arms length," or effective competition;
23 that any loss of customers by Qwest to QCC would reflect a migration policy of the consolidated entity
accomplished through a joint marketing program which does not distinguish between regulated and non-regulated
24 operations; that customers will not recognize the risk of being migrated from the regulated entity to the unregulated
entity; that allowing QCC to operate in QC territory would allow Qwest to circumvent rate regulation of local
exchange service simply by providing that service through QCC; and that such "self-deregulation" would be
25 accomplished without the Board making a finding of effective competition, as required by the established statutory
deregulation scheme. *In re: Qwest Communications Corporation*, Docket TCU-03-13, Order dated November 29,
2004 ("*Iowa QCC Order*"), at 4-5.

26 ⁷ *Iowa QCC Order*, at 5.

1 of QCC's agreement to continue QC's current practice (which is also in place in Arizona) of
2 disclosing to customers who call Qwest to inquire about obtaining services of the availability,
3 from QC, of rate-regulated, flat-rate single line residential service (1FR).⁸

4 In Nebraska, the Public Service Commission granted QCC authority to operate statewide,
5 subject to certain limitations and controls for QCC service in QC incumbent territory that were
6 already in place from a 1998 Nebraska Commission order; however, the Commission observed
7 in its order granting QCC authority that the changing market for telecommunications requires re-
8 evaluation of older views of affiliate competition in incumbent territory:

9 In light of the testimony of Qwest regarding the state of competition in Nebraska,
10 however, the Commission encourages Qwest to immediately file a request to
11 terminate the limitation of service offerings within the affiliate ILEC's service
territory consistent with the direction in Docket No. C-1839/PI-22. The
Commission will process Qwest's request on an expedited basis.⁹

12 QCC has filed the request "encouraged" by the Nebraska Commission, and the proceeding is
13 pending.¹⁰ QCC believes that the restrictions imposed by the Nebraska Commission's 1998
14 order are improper and is optimistic that they will be lifted in the pending docket; regardless,
15 Nebraska still allows QCC to compete for a substantial portion of business and government
16 customers in QC territory.

17 Staff's Report also mentions a few non-QC states that purportedly limit BOC affiliates
18 from competing in incumbent territory, but closer examination of the laws in these states shows
19 that none of them have taken the extreme approach recommended by Staff here. Some of the
20 states do not even take the approach Staff claims they do. For instance, Kansas is cited as a
21 jurisdiction which only approves CLEC affiliate applications for advanced services. But in the
22 application cited in the Staff Report, the applicant, an affiliate of SBC, only requested to provide

23 ⁸ *Qwest Communications Corporation, Local Exchange Public Convenience and Necessity*, Case No. PU-04-160,
24 Order dated July 21, 2004 ("North Dakota QCC Order"), at 3-4.

25 ⁹ *In the Matter of the Application of Qwest Communications Corporation Seeking Authority to Operate as a*
Competitive Local Exchange Carrier of Telecommunications Services Within the State of Nebraska, Application
No. C-3201, Order Dated December 14, 2004 ("Nebraska QCC Order"), at 5.

26 ¹⁰ The matter is Docket No. C-3335, and is titled *In the Matter of the Application of Qwest Communications*
Corporation to Remove Restrictions of Commission Order in Docket C-1839.

1 advanced services.¹¹ The provision of basic, voice services was not proposed and was not at
2 issue. Similarly, in the Alabama case cited in footnote 8 of the Staff Report, while Staff claims
3 that "at least one state has certificated the BOC CLEC affiliate to operate outside of its BOC
4 ILEC service territory," the applicant in that case was BellSouth, Inc., the BOC itself, which was
5 seeking CLEC authority outside its incumbent territory.¹² Neither the issue of CLEC affiliate
6 authority nor the issue of affiliates serving in incumbent territory were present in that case.

7 Staff also claims that in Texas, TEX. UTIL. CODE § 54.102 permits an affiliated CLEC to
8 provide advanced services, but not flat-rated local exchange services to residential and business
9 customers in the BOC's serving area. However, TEX. UTIL. CODE § 54.102(e) expressly *permits*
10 affiliated CLECs to provide such services, except to the extent that the provision of services
11 would result in an individual customer-based contract that the affiliated ILEC could not
12 otherwise offer.¹³

13 *An affiliate of a company that holds a certificate of convenience and necessity*
14 *and that serves more than five million access lines in this state may hold a*
15 *certificate of operating authority or service provider certificate of operating*
16 *authority to provide service in an area of this state in which its affiliated*
17 *company is the incumbent local exchange company. However, the affiliate*
18 *holding the certificate of operating authority or service provider certificate of*
19 *operating authority may not provide in that area any service listed in Sections*
20 *58.051(a)(1)-(4) or Sections 58.151(1)-(4), or any subset of those services, in a*
21 *manner that results in a customer-specific contract so long as the affiliated*
22 *company that is the incumbent local exchange company may not provide those*
23 *services or subsets of services in a manner that results in a customer-specific*
24 *contract under Section 58.003 in that area. . . .*¹⁴

21 _____
22 ¹¹ In the Matter of the Application of SBC Advanced Solutions, Inc. for a Certificate of Convenience and Authority
23 to Transact the Business of a Telecommunications Carrier for the Purpose of Providing Advanced Data Services and
24 Other Telecommunications Services Within the State of Kansas and for Approval of its Initial Tariff, Docket No.
OO-SBAT-247-COC, Kansas Corporation Commission. 2000 Kan. PUC LEXIS 1068 (January 13, 2000), ¶¶ 1, 14.

24 ¹² BellSouth Telecommunications, Inc., Applicant, DOCKET 27663, Alabama Public Service Commission
2000 Ala. PUC LEXIS 72 (Order dated September 13, 2000).

25 ¹³ It would appear from the statutory language that if the affiliated ILEC could offer an individual customer-based
26 contract, the affiliated CLEC could also offer such services in the incumbent's territory.

¹⁴ TEX. UTIL. CODE § 54-102(e) (emphasis added). TEX. UTIL. CODE § 58.003 permits large ILECs to offer
customer-specific contracts if the ILEC installed SS7 signaling and fiber links between its central offices and
tandem switches.

1 One state Staff did not mention in its survey of states addressing competition by affiliated
2 CLECs is Kentucky. In 1997, Kentucky's Public Service Commission limited a BellSouth
3 affiliated CLEC, BellSouth BSE, to areas outside BellSouth's incumbent territory. In 1999,
4 Kentucky's Commission removed that restriction, and permitted BellSouth BSE "to provide
5 local exchange service on a statewide basis."¹⁵ That 1999 order did not restrict BellSouth BSE
6 from pursuing any specific customers or class of customers in BellSouth's incumbent territory,
7 but did impose some reporting, separations, and accounting requirements on BellSouth BSE.¹⁶
8 Subsequently, on October 29, 2004, most of even those restrictions were deemed unnecessary
9 and removed, because the Kentucky Commission found the concerns it previously held about
10 anticompetitive behavior and use of an affiliate to avoid Commission regulation "have not
11 materialized."¹⁷ Kentucky's approach reflects regulation aimed at the current competitive
12 landscape – not the vastly different competitive environment that existed in 1997 and 1998.

13 Finally, Staff's Report ignores the fact that in 2003, this Commission, after years of
14 testing, investigation, and testimony, concluded that Arizona's telecommunications markets were
15 open to competition when it recommended that the FCC approve Qwest's application to re-enter
16 the long distance market in Arizona. These realities of the present market and legal landscape
17 require and warrant a far different approach than contained in Staff's Report, and Staff's
18 recommendation number 19 in particular.

19 ///

20 ///

21 ///

22 ///

23 ¹⁵ Order, *An investigation into the Propriety of, and Potential Safeguards for, the Provision of Local Exchange*
24 *Service by GTE Communications Corporation*, Case No. 98-410, Kentucky Public Service Commission, August 31,
25 1999.

25 ¹⁶ 1999 Kentucky PSC Order, p 4-5.

26 ¹⁷ Order, *An investigation into the Propriety of, and Potential Safeguards for, the Provision of Local Exchange*
Service by GTE Communications Corporation, Case No. 98-410, Kentucky Public Service Commission, October 29,
2004.

1 **C. QCC Lacks the Legal Ability to Improperly Leverage QC's ILEC Position and**
2 **Engage in Anti-Competitive Conduct such as Cross-Subsidization, Discrimination,**
3 **or Price-Squeezing.**

4 The first and third listed concerns on page 8 of Staff's Report boil down to the same
5 argument: QC will treat QCC more favorably than other CLECs, which would harm
6 competition. These concerns are based on two false premises: (1) that under existing federal and
7 Arizona law, QC can discriminate in favor of QCC compared to other CLECs, and (2) that the
8 FCC and this Commission are unable and/or unwilling to enforce these laws.

9 **1. Federal and state laws prohibit discrimination.**

10 As to the first point, a bevy of federal and state laws currently require transparency of all
11 of QC's transactions with QCC, and prevent both QC and QCC from improperly "leveraging"
12 their relationship. Sections 251 and 252 of the Act bar QC from discriminating against other
13 CLECs in its interconnection dealings with QCC imposing on QC:

14 The duty to provide, to any requesting telecommunications carrier for the
15 provision of a telecommunications service, nondiscriminatory access to network
16 elements on an unbundled basis at any technically feasible point on rates, terms,
and conditions that are just, reasonable, and nondiscriminatory¹⁸

17 To this end, in all fourteen QC in-region states, QCC has entered into agreements with QC
18 consistent with and modeled upon QC's statement of generally available terms ("SGAT"), and
19 those agreements have been filed for approval and have become effective.

20 Arizona's state discrimination laws are similarly broad. Arizona's Constitution requires
21 QC's charges for its services to be just, reasonable, and non-discriminatory:

22 All charges made for service rendered, or to be rendered, by public service
23 corporations within this State shall be just and reasonable, and no discrimination
24 in charges, service, or facilities shall be made between persons or places for
rendering a like and contemporaneous service¹⁹

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26 ¹⁸ 47 USC § 251(c)(3).

¹⁹ ARIZONA CONSTITUTION, Art. 15, § 12.

1 Similarly, Arizona Rev. Stat. § 40-334 prohibits discrimination in a wide array of circumstances:

2 **Discrimination between persons, localities or classes of service as to rates,
3 charges, service or facilities prohibited.**

4 A public service corporation shall not, as to rates, charges, service, facilities, or in
5 any other respect, make or grant any preference or advantage to any person or
6 subject any person to any prejudice or disadvantage.

7 No public service corporation shall establish or maintain any unreasonable
8 difference as to rates, charges, service, facilities or in any other respect, either
9 between localities or between classes of service.

10 The commission may determine any question of fact arising under this section.²⁰

11 In addition, the existing requirements of AAC R14-2-804 regarding Commission review of
12 transactions between public utilities and affiliates further require transparency and fairness in
13 affiliate transactions.²¹ These requirements prevent discrimination, cross-subsidization, or other
14 anti-competitive conduct, as the FCC observed in paragraph 315 of the *Section 272 Non-
15 Accounting Safeguards Order* quoted above.²²

16 Sections 271 and 272 of the Act, and the regulations adopted under those statutes, even
17 more sharply limit and control any opportunity for QCC to receive more favorable treatment
18 from QC compared to any other CLEC, on a broader spectrum of transactions. Section 272(b)
19 requires the long distance affiliates of QC, like QCC, to be structurally separated from the ILEC,
20 specifically requiring that QC and QCC:

21 (1) shall operate independently from the Bell operating company;

22 (2) shall maintain books, records, and accounts in the manner prescribed
23 by the Commission which shall be separate from the books, records, and accounts
24 maintained by the Bell operating company of which it is an affiliate;
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26 ²⁰ ARIZ. REV. STAT. § 40-334.

²¹ Because of the limited extent of the waiver from R14-2-803 granted in Decision No. 64654, QCC agrees with Staff's recommendation in section 2.8 of its Report that the waiver need not be revisited at this time.

²² *Supra*, p.4 ("To the extent that there are concerns that the BOCs will unlawfully subsidize their affiliates or accord them preferential treatment, we reiterate that improper cost allocations and discrimination are prohibited by existing Commission rules and sections 251, 252 and 272 of the 1996 Act, and that predatory pricing is prohibited by the antitrust laws. . .").

1 (3) shall have separate officers, directors, and employees from the Bell
2 operating company of which it is an affiliate;

3 (4) may not obtain credit under any arrangement that would permit a
4 creditor, upon default, to have recourse to the assets of the Bell operating
5 company; and

6 (5) shall conduct all transactions with the Bell operating company of
7 which it is an affiliate on an arm's length basis with any such transactions reduced
8 to writing and available for public inspection.²³

9 Moreover, QC cannot discriminate in favor of QCC and against other CLECs – and not only in
10 the more limited context of interconnection pursuant to sections 251 and 252. Section 272(c)
11 requires that QC :

12 (1) may not discriminate between that company or affiliate and any other
13 entity in the provision or procurement of goods, services, facilities, and
14 information, or in the establishment of standards; and

15 (2) shall account for all transactions with an affiliate described in
16 subsection (a) in accordance with accounting principles designated or approved
17 by the Commission.²⁴

18 In addition, section 272(e) provides that QC:

19 (1) shall fulfill any requests from an unaffiliated entity for telephone
20 exchange service and exchange access within a period no longer than the period
21 in which it provides such telephone exchange service and exchange access to
22 itself or to its affiliates;

23 (2) shall not provide any facilities, services, or information concerning its
24 provision of exchange access to the affiliate described in subsection (a) unless

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26 ²³ 47 USC § 272(b). *See also* 47 CFR § 53.203.

²⁴ 47 USC § 272(c).

1 such facilities, services, or information are made available to other providers of
2 interLATA services in that market on the same terms and conditions;

3 (3) shall charge the affiliate described in subsection (a), or impute to itself
4 (if using the access for its provision of its own services), an amount for access to
5 its telephone exchange service and exchange access that is no less than the
6 amount charged to any unaffiliated interexchange carriers for such service; and

7 (4) may provide any interLATA or intraLATA facilities or services to its
8 interLATA affiliate if such services or facilities are made available to all carriers
9 at the same rates and on the same terms and conditions, and so long as the costs
10 are appropriately allocated.²⁵

11 Staff ignores these laws. *Staff Data Request Response* No. 1-4(c) indicates that the “anti-
12 competitive conduct” alleged in the first identified concern in the Staff Report means QC
13 charging QCC below market rates for certain services, “because QCC’s competitors would not
14 have access to the same deals available to QCC from QC.” *Staff Data Request Response* No. 1-
15 4(f) defines “cross-subsidization” as used in the first listed concern in the Staff Report as “the
16 ability of QCC to receive services from QC at below market rates.” *Staff Data Request Response*
17 No. 1-6(a) defines “discrimination” as identified in Staff’s third listed concern to “mean[] that
18 QC could provide more favorable terms of service to QCC that it does not provide to other
19 CLECs.” But each of these three concerns is clearly and repeatedly condemned in the Act, its
20 underlying regulations, the 272 *Non-Accounting Safeguards Order*, and Arizona’s constitution
21 and statutes.

22 In its Report, Staff claims that the prohibitions of section 272 “do[] not address all of
23 Staff’s concerns in this regard.” QCC inquired why, and *Staff Data Request* No. 1-4(b)

24 ²⁵ 47 USC § 272(e)

25 ³⁰ *Section 272 Non-Accounting Safeguards Order*, ¶ 216.

1 answered: "Section 272 applies to QCC's provision of interLATA services. The various
2 restrictions do not apply to QCC's provision of competitive local services." That simply
3 misstates the law. The FCC interprets the non-discrimination obligations of section 272(c) very
4 broadly, holding in the *Section 272 Non-Accounting Safeguards Order* that "in enforcing the
5 nondiscrimination requirement of section 272(c)(1), we intend to construe these terms broadly to
6 prevent BOCs from discriminating unlawfully in favor of their section 272 affiliates."³⁰ As a
7 result, the FCC refused "to interpret the terms in section 272(c)(1) as including only
8 telecommunications-related or, even more specifically, common carrier-related 'goods, services,
9 facilities, and information,'"³¹ and ultimately concluded "that the protection of section 272(c)(1)
10 extends to any good, service, facility, or information that a BOC provides to its section 272
11 affiliate."³² More specifically, the FCC determined that the non-discrimination obligations of
12 section 272(c) include and extend beyond the non-discrimination obligations of section 251(c),³³
13 such that there should be no dispute as to whether BOCs' nondiscrimination obligations apply
14 even to its affiliates' local exchange operations:

15 Although we conclude that the 1996 Act authorizes section 272 affiliates to
16 purchase unbundled elements, *we emphasize that BOC facilities and services*
17 *provided to section 272 affiliates must be made available to others on the same*
18 *terms, conditions, and prices provided to the BOC affiliate pursuant to the*
19 *nondiscrimination requirements of sections 272 and 251(c)(3).* Thus, if a BOC
20 affiliate is a requesting carrier under section 251, the BOC is required to treat
21 unaffiliated requesting carriers in the same manner that the BOC treats its
22 affiliate, unless the unaffiliated entity has requested different treatment. For
23 example, if a BOC were to provide its section 272 affiliate with access to
24 operational support systems (OSS) functions via a different method or system
25 than it provides to requesting carriers under section 251, we would regard such
26 discriminatory treatment as a violation of section 251(c)(3). *We believe such*
nondiscrimination requirements will prevent BOCs from providing special
*treatment to their affiliates.*³⁴

31 *Id.*, ¶ 217.

32 *Id.*, ¶ 218.

33 *Id.*, ¶ 219 ("We also conclude that the terms "services," "facilities," and "information" in section 272 should be interpreted to include, among other things, the meaning of these terms under section 251(c). The term "facilities," therefore, includes but is not limited to the seven unbundled network elements described in the First Interconnection Order.")

34 *Id.*, ¶ 316 (emphasis added). See also ¶ 315, quoted *supra* p.4.

1 Staff is simply wrong on the law – and this is without even considering the broad non-
2 discrimination requirements of the Arizona Constitution and ARIZ. REV. STAT. § 40-334. Quite
3 simply, QC cannot provide virtually any service – whether telecommunications or non-
4 telecommunications, local or non-local – to QCC in a discriminatory fashion.

5 **2. Existing regulations require disclosure and monitoring to ensure prohibited**
6 **discrimination does not occur.**

7 The existing federal scheme does not rely simply on prohibiting discrimination by BOCs.
8 Section 272 and the regulations adopted thereunder also require QC to post all transactions
9 between itself and QCC to a website, and to make the agreements underlying those transactions
10 available on request. In fact, the Staff refers to this requirement on page 5 of its report and states
11 that it has reviewed these filings and found that QC and QCC substantially comply with these
12 regulations, and further states that it “is not aware of any complaint filed by another carrier
13 against QCC and/or QC alleging anticompetitive conduct.” These requirements of separation,
14 non-discrimination, and disclosure are further enforced and monitored by a biennial audit by an
15 independent auditor, whose report is submitted to the FCC and made available to applicable state
16 Commissions.³⁵ Staff glosses over these existing protections. Despite the fact that its own
17 additional investigation and review of the biennial audit revealed that Qwest is complying with
18 these obligations (without comment from the competitors and regulators from various states with
19 access to the audit report),³⁶ Staff nevertheless assumes violations of the law will take place, and
20 further assumes that the FCC and this Commission lack the ability or will to enforce these laws.
21 These baseless assumptions insult the integrity of the enforcement system as well as QC and
22 QCC. Such assumptions are bad policy and would result in bad law.

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26 ³⁵ 47 USC § 272(d); 47 CFR § 53.209 *et seq.*

³⁶ Staff Report, at 6.

1 **3. Use of the Qwest brand is not improper "leveraging" of QC's ILEC position.**

2 Staff's only articulated concern regarding QCC's "leveraging" QC's ILEC position,
3 indicated in its responses to QCC's data requests, "addresses the potential advantages that a QCC
4 CLEC operation could gain over other CLECs by using QC's ILEC customer recognition,
5 knowledge of customers and established assets."³⁷ No law or public interest prohibits QCC from
6 benefiting from name recognition associated with the Qwest brand, just as AT&T's CLEC
7 operations may benefit from the AT&T brand, regardless of the formal name of the corporate
8 entities involved. There is no legal justification for this Commission to limit Qwest's ability to
9 brand its services more than it limits AT&T's or MCI's. Moreover, as discussed above, QCC
10 and the other section 272 affiliate of QC, Qwest LD Corp. ("QLDC") already use the Qwest
11 brand name; use of the Qwest name would only continue branding for QCC's CLEC operations
12 that is already in place for its long distance operations.

13 **4. Staff's Concerns About CPNI Misuse Are Unfounded.**

14 Staff claims in its Report that QCC's responses to data requests cause concern that QCC
15 and QC will misuse QC CPNI, thus giving QCC an improper competitive advantage. First, this
16 "concern" is based on a misunderstanding of CPNI law. QCC will not have access to QC's
17 CPNI any differently than another CLEC would have access to the CPNI of its affiliates or the
18 CPNI of its own customers for other categories of service. Second, Staff admits that QCC's
19 proposed use of QC CPNI, as stated in its responses to Staff data requests, would comply with
20 federal CPNI law³⁸ and the currently proposed Arizona state CPNI rule.³⁹ When QCC asked
21 staff to articulate "how and why the Staff's concern about permissible use of CPNI is different
22 for the relationship between QC and QCC as compared to AT&T's use of its customers' CPNI
23 related to local and long distance services and sales, Staff responded that "AT&T is not the
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25 ³⁷ Staff's Response to Qwest [Communications] Corporation's First Set of Data Requests ("Staff Data Request
Response"), No. 1-4(a).

26 ³⁸ Staff Data Request Response No. 1-12(c).

³⁹ Staff Data Request Response No. 1-12(d).

1 dominant provider of either local or long distance service to customers in Arizona.”⁴⁰ In other
2 words, Staff’s concern is not with how CPNI would be shared, but who would be sharing that
3 information, thus prohibiting such sharing for some carriers but not others. The Commission
4 should reject Staff’s discriminatory “concerns” in this regard.

5 **5. Staff’s “price squeeze” concerns are unfounded and belong in another**
6 **docket.**

7 Staff’s Report does not discuss its concern about so-called price squeezes. Even its
8 responses to the Qwest Data Requests indicate “price squeeze” issues are being addressed in the
9 AFOR docket, and are “more of a concern with respect to CLECs in general.”⁴¹ While QCC
10 disagrees with most of the arguments commonly made about “price squeezes,” QCC does agree
11 those arguments really have no place in this docket. No action the Commission could take on
12 QCC’s Application could alter QC’s wholesale obligations. QCC, as a CLEC reliant on non-
13 discriminatory access to QC’s network elements under the readily available terms of QC’s
14 SGAT, simply cannot place any other carrier in a price squeeze position. Even if at some point
15 in the future QCC obtained facilities for its local exchange operations, and if QCC were to sell
16 access to those facilities or services using those facilities at wholesale, and if QCC’s prices were
17 higher than TELRIC standards would otherwise yield, any carrier would still have access to
18 network elements from QC at TELRIC rates. Staff’s “price squeeze” concerns are baseless.
19 Regardless, resolution of these concerns is more properly left to other dockets.

20 **D. QCC’s Joint Marketing Efforts, Expressly Permitted Under Section 272 of the Act,**
21 **Will Not Create Any Harmful Confusion in the Marketplace.**

22 Without foundation, Staff claims that consumer confusion could result from QCC and
23 QC both offering services in QC incumbent territory. To the contrary, the fact that QC and QCC
24 will both use the Qwest brand name will *reduce* any potential for customer confusion. Use of
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26 ⁴⁰ Staff Data Request Response No. 1-12(e).

⁴¹ Staff Data Request Response No. 1-4(i).

1 the Qwest name tells Arizona customers from whom their telephone services are purchased and
2 from whom they can obtain service. This will continue as QCC uses the Qwest name to market
3 its CLEC services. On the other hand, if QCC used different names for its CLEC services and its
4 IXC services, customer confusion would likely result, as the Qwest affiliation would not be clear
5 to consumers. The use of a name other than Qwest to market its services could potentially
6 subject QCC to allegations that it was intentionally trying to mislead customers and hide its
7 relationship to QC. It is not clear that a QCC customer who thought he/she was dealing with the
8 RBOC entity because the service had been marketed as "Qwest" would be more confused and/or
9 upset than a customer who purchased service from "Generic Arizona CLEC" believing that
10 he/she was dealing with someone other than Qwest. Moreover, as noted above, similar corporate
11 names or branding strategies have been allowed in Arizona for years. Many independent
12 incumbent carriers use their corporate name in their CLEC operations, and other IXC/CLEC
13 affiliates such as AT&T, MCI, and Sprint are permitted to use their parent corporations' brands
14 in their marketing. Use of the Qwest brand is consumer-friendly and is in the public interest.

15 Staff's concern about consumer confusion must also be rejected on legal grounds. In
16 section 272(g) of the Act, Congress made clear that BOCs like QC and Section 272 affiliates like
17 QCC could jointly market their services. Staff's concern about customer confusion would, as a
18 practical matter, limit QCC's rights to joint marketing in contravention of the federal Act. The
19 Commission should reject Staff's proposal to preempt section 272.

20 **E. Approving QCC's Application Will Not Enable QC to Evade its Regulatory**
21 **Obligations.**

22 Staff argues that if QCC has authority to provide CLEC services in QC incumbent
23 territory, QC will be able to evade its regulatory obligations. Staff fails to articulate, however,
24 either what obligations QC could possibly evade with QCC's presence in its incumbent territory,
25 or how QCC's presence in QC incumbent territory could enable QC to evade any of those
26 obligations. Staff doesn't articulate these risks, because they do not exist. As noted above,

1 approving QCC's Application will not have any effect whatsoever on QC's regulatory
2 obligations in QC's territory. QC will retain all wholesale obligations, and will retain all of its
3 non-discrimination, rate and service quality obligations. Even Staff concedes that the FCC has
4 "many times stated that a BOC can not use an affiliate to evade its regulatory obligations under
5 sections 252, 252, and 271 of the Act."⁴² QCC agrees.

6 **F. QCC's Presence in Arizona's Competitive Market for Telecommunications Will**
7 **Serve the Public Interest.**

8 Staff's fifth articulated concern is that Arizona's telecommunications market is not
9 sufficiently competitive to permit QCC to operate in QC incumbent territory. This concern
10 misses the mark in two different ways. First, Arizona is a strongly competitive market. Cox
11 Telephone has made huge gains in the Phoenix and Tucson markets. Wireless services offer a
12 substitute for wireline for an increasing number of consumers every year.⁴³ And voice over
13 internet protocol – a service for which providers need no state certificate of authority – is
14 radically changing the competitive environment. Moreover, the ready availability of unbundled
15 network elements at TELRIC prices means that an entrepreneur can compete with Qwest with
16 only a limited capital investment. These existing market forces, combined with the relative ease
17 with which a competitor could enter the market even if anticompetitive behavior drove other
18 carriers away, effectively prevents Qwest from engaging in – or at least profiting from – any
19 anticompetitive behavior, even if the Commission assumes it cannot enforce existing laws.
20 Consumers have so many alternatives to Qwest service, and barriers to entry are so low, that any
21 increased costs or decreased profits Qwest might suffer in order to pursue any given
22 anticompetitive business strategy cannot be regained even if Qwest could drive its wireline
23 competitors from the market.

24 ⁴² Staff Report, at 10.

25 ⁴³ Though not a perfect substitute for every customer, wireless services offer a full or partial substitute for many
26 wireline customers and services. Indeed, QCC anticipates that the evidence at hearing will reveal that there are now
more wireless "access lines" than wireline. Thus, the presence of wireless services in the market constrains almost
every marketing decision wireline carriers make.

1 Second, Staff's concerns appear to be articulated from the perspective of protecting
2 competitors, rather than the perspective of competition or consumers themselves. If QCC is
3 granted the authority it seeks, customers in QC incumbent territory that desire single provider,
4 single bill, and combined local services with intra- and interLATA services will have an
5 additional choice they presently lack. Additional choices for consumers mean more competition,
6 lower prices and greater innovation.⁴⁴ This serves the public interest.

7 **III. NOTICE REQUIREMENTS**

8 In Section 5.1 of the Staff Report, at page 16, Staff states, "At this time, the Applicant has
9 not yet published legal notice of the Application in all counties in which it requests authorization
10 to provide service." QCC has complied with the notice requirements of the procedural
11 order in this docket. The legal notice was published on February 11, 2005 and the
12 affidavit was filed with Docket Control on February 24, 2005.

13 **IV. CONCLUSION**

14 For the reasons stated above, the Qwest's Application for Certificate of Convenience and
15 Necessity is reasonable and in the public interest and should be approved. Staff's recommended
16 condition number 19 is unreasonable, arbitrary, and capricious. To the extent that the concerns
17 Staff expresses are not illusory, existing laws provide ample protection against potential abuse.
18 Further, Staff's recommended condition number 19 would prohibit or have the effect of
19 prohibiting the ability of Qwest Communications Corporation to provide intrastate telephone
20 service, and would therefore violate 47 U.S.C. Section 253 of the Act. Qwest Communications

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25 ⁴⁴ *Section 272 Non-Accounting Safeguards Order*, ¶ 315 ("We agree with the BOCs that the increased flexibility
26 resulting from the ability to provide both interLATA and local services from the same entity serves the public
interest, because such flexibility will encourage section 272 affiliates to provide innovative new services.")

1 Corporation's certificate of convenience and necessity should not be limited to areas outside of
2 Qwest Corporation's service territory, or otherwise.

3 RESPECTFULLY SUBMITTED this 16th day of March, 2005.

4
5 QWEST COMMUNICATIONS CORPORATION

6
7
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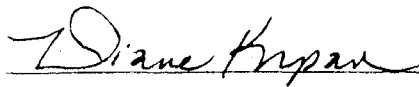
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